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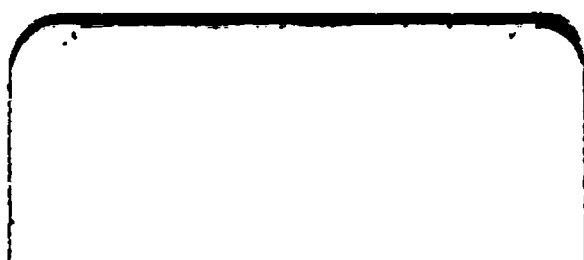
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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS
OF THE
UNITED STATES
FOR THE
FIFTH JUDICIAL CIRCUIT.

REPORTED BY
WILLIAM B. WOODS,
THE CIRCUIT JUDGE.

VOL. III.

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JUDGES
OF THE
CIRCUIT COURTS OF THE UNITED STATES
FOR THE
FIFTH JUDICIAL CIRCUIT.

HON. JOSEPH P. BRADLEY, CIRCUIT JUSTICE.

HON. WILLIAM B. WOODS, CIRCUIT JUDGE.

DISTRICT JUDGES:

HON. JOHN ERSKINE,
DISTRICTS OF GEORGIA.

HON. THOMAS SETTLE,
NORTHERN DISTRICT OF FLORIDA.

HON. JAMES W. LOCKE,
SOUTHERN DISTRICT OF FLORIDA.

HON. JOHN BRUCE,
DISTRICTS OF ALABAMA.

HON. ROBERT A. HILL,
DISTRICTS OF MISSISSIPPI.

HON. EDWARD COKE BILLINGS,
DISTRICT OF LOUISIANA.

HON. AMOS MORRILL,
EASTERN DISTRICT OF TEXAS.

HON. THOMAS H. DUVAL,
WESTERN DISTRICT OF TEXAS.

HON. ANDREW P. McCORMICK,
NORTHERN DISTRICT OF TEXAS.

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CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF THE UNITED STATES
FOR THE
FIFTH JUDICIAL CIRCUIT.

DISTRICT OF LOUISIANA.

NOVEMBER TERM, 1876.

ROSALIE MAENHAUT V. THE CITY OF NEW ORLEANS.

1. The act of the legislature of Louisiana, approved Feb. 23, 1852, by authority of which the consolidated bonds of the city of New Orleans were issued, and which declared that a special tax should be annually levied on real estate and slaves, to raise the sum of \$650,000 to be applied to the payment of the principal and interest of said bonds, is a contract with the bondholders, and remains unaffected by any subsequent legislation which seeks to impair or repeal its provisions.
2. The remedy of the bondholders for the enforcement of the contract contained in said act is at law.
3. Under the provisions of said act the holders of consolidated bonds are not entitled to priority of payment over other bondholders out of all taxes raised on real estate.
4. The bare fact that the consolidated bonds were older than bonds subsequently issued gives their holders no advantage over the holders of the bonds of later date.

IN EQUITY. Heard for final decree.

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Maenhaut v. The City of New Orleans.

Messrs. John A. Campbell and E. Bermudez, for complainants.

Messrs. B. F. Jonas, city attorney, and H. C. Miller, for defendant.

WOODS, Circuit Judge.

The complainants are holders of bonds issued by the city of New Orleans by authority of the 37th section of the act of the legislature, approved Feb. 23, 1852. The bonds issued represent what is designated as the consolidated debt of New Orleans. The act declares that "the common council shall annually in the month of January pass an ordinance to raise the sum of six hundred thousand dollars" (this sum was increased by an act approved the same day to the sum of \$650,000), "by a special tax on real estate and slaves, to be called the consolidated loan tax. * * * At the end of each and every year any surplus of the consolidated loan tax remaining in the treasury after the payment of all the interest and the expenses of the management of the debt, shall be applied to the purchase from the lowest bidder of such bonds issued under this act as have the shortest time to run." The act further provided that all ordinances, resolutions or other acts passed by the city council after the first day of January in each year should be null and void, unless the ordinance imposing the consolidation loan tax should have been previously passed. The act further provided that, after its passage, no obligation or evidence of debt of any description whatever except those thus authorized should be issued by the city of New Orleans, or under its authority, nor should any loan be contracted unless the same should be authorized by a vote of a majority of the qualified voters of said city.

About \$10,000,000 in bonds were issued under authority of the act, of which there are still outstanding over \$4,142,000, and the complainants hold a part of this issue of bonds.

The bill charged that there had been collected by the city authorities and deposited to the credit of the consolidated loan, the sum of \$174,000, and asked for an injunction restraining the city from diverting this fund to any other

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purpose than the payment of the interest on the consolidated loan.

It appears, from the report of the master, that for a long period after the passage of the act of 1852 collections of taxes were made and applied with regularity under the provisions of the 37th section of the act; that subsequently, for a number of years, there was no attempt to levy and collect the tax required by said section; that large sums collected under the act were misapplied and used by the city for other purposes than those prescribed by the act; that in 1872 the legislature passed an act to postpone the levy and collection of the tax for the sinking fund to pay the principal of the consolidated bonds, but provided for the payment of the interest; and finally, that in 1876 the legislature passed an act authorizing what was called the premium bond plan for paying the city debt, and repealing all laws for the levy and collection of the tax authorized and required by the act of 1852.

On a former hearing an injunction was allowed, as prayed in the bill, forbidding the city from diverting to any other object the taxes collected by virtue of the act of 1852 for the payment of the interest on the consolidated loan, and the fund so collected has been applied as required by law and the rights of the complainants.

On this, the final hearing, it is moved that the court decree that complainants are entitled (1) to a specific performance of their contract with the city contained in section 37 of the act of 1852; (2) to the levy, collection and exclusive application to the payment of the principal and interest of their bonds, of the sum of \$650,000, to be levied upon the real estate of the city; (3) to a priority of payment out of the taxes raised by the city upon its real estate, to the extent of \$650,000; and (4) to an injunction restraining the city from applying any of its revenues raised or hereafter to be raised by levy on real estate, to the payment of any other debt or demand, until complainants' claims as bondholders have been fully provided for and satisfied.

So far as the first two of these demands of the complainant is concerned, I am of opinion that the act of 1852 above men-

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tioned contains a contract valid and binding on the city, and that the bondholders are entitled to exact the substantial performance of the contract. I have so held upon the former hearing of his case: *Maenhaut et al. v. The City of New Orleans*, 2 Woods, 108.

The 37th section of the act of 1852, constituting as it does a contract between the city and the bondholders, stands unaffected by any subsequent legislation that seeks to impair or repeal its provisions. But the remedy of the complainants to enforce their contract is clearly not in equity, but at law, by the recovery of a judgment on their coupons and bonds, and by the writ of *mandamus* commanding the levy and collection of the tax required by law. The relief at law is plain, adequate and complete, and equity can not be resorted to: *Heine v. The Levee Commissioners*, 19 Wall., 655.

The claim that the complainants are entitled to priority of payment out of all taxes raised on real estate, and to an injunction forbidding the application of taxes so raised to any purpose whatever until their claims are satisfied, cannot be sustained.

The contract between the city and the bondholders contained in section 37 of the act of 1852 does not give the bondholders any priority of payment over other bondholders out of the taxes on the real estate of the city. The contract entitles these bondholders to have levied on the real estate of the city and paid them annually the sum of \$650,000, and it entitles them to nothing more. The city may levy on real estate other sums to pay its current expenses or to pay its other debts. These bondholders derive no advantage from the fact that their bonds may be older than those held by other persons. If the city should levy and collect annually \$650,000, to apply to the principal and interest of the issue of bonds held by complainants, and should so apply it, the contract of the city would be fully performed. The complainants would have no right to say that the city could not levy other taxes on its real estate or pay such taxes in any order it chose.

The questions presented by this part of the prayer for

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relief were discussed in the case of *Ranger v. The City of New Orleans*, 2 Woods, 128, and a result reached adverse to granting the relief prayed.

The injunction allowed *pendente lite* will be made perpetual. All other relief prayed for must be refused.

HIRAM D. BARRAS, Adm'r, v. DAVID BIDWELL.

1. Under the jurisprudence of Louisiana, an exception to the petition of a plaintiff who sues as administrator, to the effect that the plaintiff is not administrator, must be pleaded *in limine litis*; it cannot be pleaded after judgment by default or after the filing of a defense to the merits.
2. Such an exception cannot be embodied in the answer, and by the rule of the court it must be verified by affidavit.
3. The same rules apply to the exception of *lis pendens*.
4. Fraud practiced in the recovery of a judgment cannot be pleaded in an action on the judgment, prosecuted in another state, unless such defense could be made in the courts of the state where the judgment was rendered.
5. It is a good ground of exception to a claim in reconvention, that it has been substantially adjudicated in another suit between the same parties in another state, where it was pleaded as a counter-claim.
6. The fact that the claim in reconvention is somewhat broader than the counter-claim, though founded on the same contract, will not relieve it from the exception. The whole might and should have been litigated and decided in the issue raised on the counter-claim.
7. A claim in reconvention should be pleaded with the same precision and detail as an original cause of action.

Heard upon defendant's exceptions to plaintiff's petition, on plaintiff's motion to strike out defendant's answer, and on plaintiff's exception to the defendant's claim in reconvention.

Mr. W. W. Howe, for plaintiff.

Mr. R. De Gray, for defendant.

Woods, Circuit Judge. I. The defendant has incorporated in his answer an exception to the plaintiff's petition whereby he denies that the plaintiff is or ever was the administrator of the estate of Charles M. Barras, and avers that he never has been appointed, recognized or qualified as such in the state

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of Louisiana, and, therefore, cannot maintain this action in this state.

This exception cannot stand for several reasons. *First*, it is pleaded, as the record shows, after a judgment by default, which is forbidden by art. 333, Code of Practice. *Second*, even if there had been no default, it comes too late, for it should have been pleaded *in limine litis*: Art. 333, Code of Practice. *Third*, it is waived by the filing of defenses on the merits: *Wingate v. Wheat*, 6 La. An., 241. *Fourth*, it is embodied in the answer, which is expressly forbidden by art. 333, Code of Practice: *Pecquet v. Pecquet*, 17 La. An., 232. *Fifth*, it is not verified as required by rule 6 of this court.

The exception is, therefore, overruled.

The second exception is *lis pendens*. This is open to the same objections as the exception just considered. It is also conceded not to be well founded in fact. It is, therefore, dismissed.

II. The action of the plaintiff is based on the record of a judgment recovered in a cause between the same parties in the superior court of the city of New York, on Feb. 2, 1876. One of the defenses to the action is, that the judgment was obtained by fraud and improper practices on the part of the plaintiff; that defendant had a good and valid defense against the claim on which the judgment was rendered, which had been made known to his attorney, and proof thereof put in his possession, with instructions to make said defense, and the plaintiff fraudulently and corruptly induced defendant's attorney to withhold said defense and absent himself from the trial of the cause, and withhold the evidence in his possession, and permit the plaintiff to obtain said judgment against the defendant.

The plaintiff moves to strike out this answer. The question is thus presented, whether fraud practiced in the recovery of a judgment can be pleaded in an action on the judgment.

Article 4, sec. 1, of the constitution of the United States, declares that "full faith and credit shall be given in each

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state to the public acts, records and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Pursuant to this constitutional provision, congress has prescribed how the records and judicial proceedings of the courts of the states and territories, shall be authenticated, and has declared that "the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken:" Rev. Stat., sec. 605.

From this statement of the law, it is clear that the plea that judgment was obtained by fraud, cannot hold unless it would be good in the courts of the state where the judgment was rendered. See *Hampton v. McConnel*, 3 Wheat., 234; *Christmas v. Russell*, 5 Wall., 290; *Maxwell v. Stewart*, 22 Wall., 77; *Mills v. Duryee*, 7 Cranch, 481; *Hockaday v. Skeggs*, 18 La. An., 682; *McLaren v. Kehler*, 23 La. An., 80.

In the state of New York, in whose courts the judgment sued on was rendered, it is held that "the judgment or decree of a court possessing competent jurisdiction is, as a general rule, final not only as to the subject matter thereby actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided:" *Embury v. Connor*, 3 N. Y., 522; *Le Guen v. Gouverneur*, 1 Johns. Cas., 436; *Etheridge v. Osborn*, 12 Wend., 399; *Gardner v. Buckbee*, 3 Cowen, 120; *Burt v. Sternburgh*, 4 Cow., 559; *Wood v. Jackson*, 8 Wend., 1; *Wright v. Butler*, 6 Wend., 284; *Lawrence v. Hunt*, 10 Wend., 80.

As we are required to give the same force and effect to their judgment as would be given it by courts of the state of New York, and as the defense here set up could not be made against the judgment in those courts, it cannot be made here.

III. The defendant, assuming the character of plaintiff in reconvention, sets up a claim to damages for the violation, by the plaintiff, of the same contract upon which the plaintiff's

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suit in the superior court of New York city was founded. The claim in reconvention alleges that the defendant contracted with the plaintiff, in consideration of certain sums of money, for the exclusive right to exhibit, within certain specified territory, a spectacular drama called the Black Crook, of which the plaintiff's intestate was the owner, and that the plaintiff, in violation of his said contract, both exhibited said drama himself and caused others to exhibit it within the territory for which the defendant had the exclusive right under said contract—whereby the defendant sustained damages in the sum of ten thousand dollars, for which sum he asks judgment against the plaintiff.

To this claim in reconvention the plaintiff has filed three exceptions. *First*, that the same cause of action was set up by way of counter-claim, in a suit between the same parties, in the superior court of the city of New York, and decided by the final judgment rendered in said cause on the 23d of December, 1876, and, *second*, that said reconvention is the same set up in the answer of the same defendant to a suit by this plaintiff, in a case No. 8053 in this court, which reconvention was excepted to by this plaintiff on the same grounds above specified, and said exceptions were sustained and the said answers in reconvention dismissed by this court; and, *third*, that said reconvention is not pleaded with sufficient particularity and detail.

In support of the first and second exceptions, the records of the cause in the superior court of the city of New York and of this court are produced.

The only difference between the counter-claim, set up in the suit in the New York superior court, and the reconvention set up in this case is, that the former avers that the plaintiff wholly neglected to protect and secure to the defendant the exercise of the sole right to exhibit said drama within the territory named in the contract, but on the contrary, permitted it to be performed in said territory by others, and the latter charges that both the plaintiff and his intestate themselves exhibited said drama and caused others to exhibit it within the same territory.

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Now, whether these two causes of action, to wit, the counter-claim set up in New York and the reconvention set up in this suit, are precisely the same, it is not necessary to determine. The claim in reconvention may be somewhat broader than the counter-claim, but it might and should have been litigated and decided in the issue raised upon the counter-claim in the superior court of New York city. The defendant is, therefore, concluded by the judgment upon the counter-claim in that case: *Embury v. Connor*, 3 N. Y., *supra*; *Voorhees v. The Bank of the United States*, 10 Peters, 449; 2 Smith's Leading Cases, title estoppel, 455, note; *Outram v. Morewood*, 3 East, 346:

The claim in reconvention set up in the suit in this court, No. 8053, and dismissed, is substantially the same as the one just passed on, and what has been said applies to it. It was also substantially disposed of by the judgment of the superior court of the city of New York.

The reconvention under consideration appears to have been pleaded in too vague and general a manner: *McMasters v. Palmer*, 4 La. An., 381; *Wilcox v. His Creditors*, 11 Rob., 347; *Jonau v. Ferrand*, 2 Rob., 216.

We think all the exceptions to the claim in reconvention, as pleaded, are well taken, and the reconvention must be dismissed.

BENJAMIN F. FLANDERS, Assignee, v. EDWARD THOMPSON,
ET AL.

1. A judgment creditor is not a *bona fide* purchaser who as such is protected against a resulting trust.
2. Where B, holding trust funds, invested them in real estate and took the title in his own name, and was afterwards compelled, by order of court, to convey the property so acquired to the party entitled to the money: *Held*, that a creditor of B, who had recovered and recorded judgments against him long before the latter took title to the property, could not, under the jurisprudence of Louisiana, acquire a lien

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thereon superior to the equities of the party with whose money the property had been paid for, and to whom it had been conveyed by order of this court.

PETITION OF REVIEW.

Mr. W. W. Howe, for petitioner.

Mr. Sam'l B. Blanc, for defendants.

WOODS, Circuit Judge. The question presented by this case is whether, under the jurisprudence of Louisiana, a trustee holding trust funds, and against whom there stand recorded judicial mortgages, can pay off such mortgages by investing the trust funds in real estate in his own name, and thus subjecting it to the lien of the judicial mortgages so recorded.

The facts were these. In the year 1869 the defendant, Edward Thompson, recovered in the fourth district court for the parish of Orleans, two judgments against one H. S. Bell, amounting in the aggregate to \$672, and in the same year had them placed on record in the mortgage office of said parish. Afterwards, in 1874, Bell was appointed assignee in bankruptcy of one J. W. Champlin. Certain assets of the bankrupt estate having come to the possession of Bell, in July, 1875, he invested them in two lots in the city of New Orleans, and took the deed therefor in his own name. These facts having been brought to the notice of the bankrupt court, Bell was in November, 1876, removed as assignee and Benj. F. Flanders appointed in his stead, and Bell was ordered to convey the said lots purchased with the means of the bankrupt estate to Flanders the new assignee, which he did. Thompson, by virtue of his judgments against Bell, recorded in 1869, now claims that he has a lien for the amount thereof on the property purchased by Bell and by him conveyed to Flanders, and that his judgments ought to be first paid out of the proceeds of their sale.

Under the general system of equity jurisprudence, a claim so unconscionable and so bare of equity would not be listened to.

The purchase by Bell, with the money of the bankrupt

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estate, subjected the property, though standing in the name of Bell, to a resulting trust in favor of the bankrupt estate: Perry on Trusts, sec. 128; *Trench v. Harrison*, 17 Simons, 111; *Gaines v. Chew*, 2 How., 619; *McDonogh v. Murdoch*, 15 How., 367.

This same doctrine is recognized in Louisiana: *Hall v. Sprigg*, 7 Martin, 244; *Rhodes v. Hooper*, 6 La. An., 357; *Giannoni v. Gunny*, 14 La. An., 632; *Livingston v. Morgan*, 26 La. An., 646.

The doctrine has been recognized and applied by the bankrupt court in this case, and Bell, who took the title in his own name to real property purchased with the money of the bankrupt estate has been compelled to convey to the assignee.

Now, the question is, does a judgment creditor of Bell who credited him long before he became assignee or acquired title to the property in question, and who has parted with nothing on the strength of Bell's apparent ownership of the property; does such a creditor stand in any better plight than Bell himself?

A judgment creditor is not a *bona fide* purchaser who is protected against a resulting trust: Story's Eq. Jur., sec. 410, note; *Burgh v. Burgh*, Rep. Temp. Finch, 28; *Matter of Howe*, 1 Paige, 125; *Keirsted v. Avery*, 4 Paige, 14; *Towsley v. McDonald*, 32 Barb., 611; *Moyer v. Hinman*, 13 N. Y., 180; *Rodgers v. Bonner*, 45 N. Y., 379; *Birchard v. Edwards*, 11 Ohio State, 84; *State Bank v. Campbell*, 2 Richardson (Equity, S. C.), 179; *Dunlap v. Burnett*, 5 Smedes & Mar., 702; *Money v. Dorsey*, 7 Smedes & Mar., 15; *Dozier v. Lewis*, 27 Miss., 679; *Watkins v. Wassell*, 15 Ark., 73; *Thomas v. Kennedy*, 24 Iowa, 397.

But it is claimed for defendant that by the jurisprudence of this state as settled by the code and the decisions of the Supreme Court, he in whose name the title is recorded must be held to be the owner as to third persons, and the latter are never required to look beyond the records.

This may be true so far as it applies to *bona fide* purchasers or to creditors who become such after the paper title has passed to their debtor. But, as we have seen, Thompson is

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not a *bona fide* purchaser, nor is it claimed that the debt due him was contracted by Bell while the latter held the paper title to the property in question.

To yield to the doctrine claimed by defendant would be to overturn the law of resulting trusts which is as firmly established in Louisiana as anywhere else: *Livingston v. Morgan*, 26 La. An., *supra* and other cases above cited.

The right of the defendant to enforce his judicial mortgage upon the property in question is based on article 3328 of the Civil Code, which declares that, "The judicial mortgage may be enforced against all the immovables which the debtor actually owns or may subsequently acquire."

It is very clear that Bell never was the actual owner of the property purchased with the funds of the bankrupt estate. He was the apparent owner only. For when the bankrupt court ascertained the facts about his purchase of the property it compelled him to convey it to the bankrupt estate.

The defendant relies upon a number of cases decided by the Supreme Court of Louisiana, but none of them seem to me to be in point. The case of *Tulane v. Levinson*, 2 La. An., 787, is supposed to be conclusive of the point under discussion. In that case George F. Barney was the owner of a lot. On the 19th of March, 1842, he conveyed the lot by public act to Jacob G. Bartlett. The deed was not recorded in the office required by law in order to give effect to its inscription. A judgment was obtained against Barney on the 28th of April, 1842, and recorded in the proper office on the 3d of May following. The property was sold on an execution issued upon this judgment, and purchased by Tulane, and the court held the title of Tulane was good.

Now, in that case the debt on which the judgment was rendered had been contracted while the legal and equitable title was in Barney. Barney was the actual owner. His deed to Bartlett never took effect. Bartlett had an equity and the judgment creditor an equity, and the court merely decided that in such a case the legal title should prevail. In other words, the decision is that when one holding the legal title to property contracts debts which are in suit, and reduced to

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judgment, his property is liable to seizure on the judgment when obtained unless he has divested himself of title by an effectual conveyance.

In the case under consideration, Thompson has not the shadow of an equity. His claim is the naked claim that his judgment recorded years before Bell was ever appointed assignee should be paid out of the funds of the bankrupt estate which Bell had misappropriated.

But it seems to me that the case of *Tulane v. Levinson* is fairly offset by the later case of *Scott v. Hayden*, 9 La. An., 336.

In this case Hayden held the legal title to certain real estate. Hennen had recovered judgment against Hayden and had it recorded, and the question was whether the judgment was a lien upon the share of Mrs. Hayden's succession in the property, the same having been acquired during the community, and nothing appearing upon the record to show that the succession had any interest in the property. The court held that the registry of the judgment created a judicial mortgage on Hayden's share and not on the share belonging to Mrs. Hayden's succession. This case is later than the case of *Tulane v. Levinson*.

I am unable to come to the conclusion that the jurisprudence of this state would sanction so unjust and inequitable a claim as that set up by the defendant. His claim to be paid out of the proceeds of this sale of the property cannot be allowed.

IN RE JOHN H. LUDWIGSON.

1. A bankrupt court should not make an order for the sale of real estate returned by the bankrupt, on the ground that the title is in dispute, when the liens upon the property exceed its value.
2. Where the title to one undivided half only of certain real estate returned by the bankrupt is in dispute, the bankrupt court is not authorized by section 5063 of the Revised Statutes to order a sale of the entire property.
3. It is doubtful whether the order, in a summary proceeding, of a bankrupt court directing the sale of real estate returned by the bankrupt,

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on the sole ground that the title thereto is in dispute, can be considered that due process of law to which the party who disputes the bankrupt's ownership is entitled.

PETITION OF REVIEW. The petition was filed by the children of the bankrupt, John H. Ludwigson, for the review of an order of the district court, made by virtue of section 5063 of Revised Statutes, directing a sale of certain real estate returned by the bankrupt on his schedule as a part of his estate.

The section referred to provides that "whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of an assignee, or which is claimed by him, is in dispute, the court may, upon petition of the assignee and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of, and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale."

Ludwigson, the bankrupt, placed upon his schedule of property surrendered, certain real estate situated in the city of New Orleans. This property was acquired by him during his coverture with his wife, to whom he was married in August, 1850, and who died in 1867. The petitioners in review, the children of Ludwigson, claimed that the said real estate was community property, and that on the death of their mother, the wife of Ludwigson, one undivided half of it descended to them as her heirs.

The assignee of Ludwigson on the 17th day of March, 1875, filed a petition in the district court praying for an order to sell said real estate, free of incumbrances. But it having been made to appear that the liens upon the property far exceeded its value, the court refused to make the order prayed for, and dismissed the petition.

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Afterwards, on April 5, 1876, the assignee filed his petition for the sale of said real estate, on the ground that the petitioners in review had set up a claim to an undivided half thereof, and prayed that the same might be sold as property which was claimed by the assignee and the title whereof was in dispute.

The district court, upon this petition, ordered the entire property to be sold. The purpose of this petition is to review this order.

Mr. Joseph P. Hornor, for petitioner.

Mr. A. Micou, for assignee.

Woods, Circuit Judge. The order of the district court is erroneous in that it orders a sale of property which is not in dispute. It appears from the petition filed in the district court that the heirs of Mrs. Ludwigson set up title only to the one undivided half of the property in question, and that the title to such undivided half only is in dispute. Yet the order is for the sale of the entire estate. As the order is based on the sole ground of disputed title, the order to sell should be limited to the property in dispute.

But should any portion of the property have been ordered to be sold? The same reason which induced the district court to refuse an order to sell the property free of incumbrances, to wit, that the incumbrances largely exceeded the value of the property, and that the general creditors had no interest in having the property sold, ought to have prevailed in this case. The property appears from the evidence to be worth only \$4,000, and the incumbrances are three or four times that sum. The general creditors have no interest in the property, and the assignee no concern in bringing it to sale. And the fact that the title to property is in dispute is a good reason why the court should be slow to order a sale, unless it be absolutely necessary to the proper administration of the bankrupt estate. The power to sell the estate of another simply on the ground that it is claimed by an assignee in bankruptcy, is a high-handed one. Whether a sale ordered by a bankrupt court in a summary proceeding, and solely on

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the ground that there is a dispute touching title of the property, can be called due process of law is, to my mind, very doubtful. Under this provision of law the claimant may be deprived of the realty of which he is in possession, asserting title simply because another person sets up title thereto: See *Greene v. Briggs*, 1 Curt., 311; *Hoke v. Henderson*, 4 Dev. Law, 15; *Taylor v. Porter*, 4 Hill, 146; *Van Zant v. Waddel*, 2 Yerg., 259; *Bank of the State v. Cooper*, *Ib.*, 599; *Jones's Heirs v. Perry*, 10 Yerg., 59. At all events it seems clear that no court should exercise the power, except in cases of absolute necessity. As in this case there was no reason why the assignee should ask a sale, the general creditors of the estate having no interest in the property, I am of opinion that the order of sale was improvidently made, and ought to be set aside.

Ordered accordingly.

THOMAS FAWCETT V. THE NATCHEZ.

1. Steamers and other water-craft navigating the Mississippi river have the right to follow the usual channels.
2. It is incumbent on those who have rafts, barges or other craft moored to the banks, to foresee and provide against accidents liable to be caused by the swell of passing steamers.

ADMIRALTY APPEAL.

The libel alleged that the libelant was the owner of a barge loaded with 8,239 barrels of Pittsburgh coal, which was safely, securely and properly moored to the bank of the Mississippi river, at Willow Grove landing, in the upper part of the city of New Orleans; that the barge was well furnished with pumps and securely and properly braced from the bank, so as to prevent her being driven on shore by the swell raised by passing boats, and that she was manned with a competent and sufficient crew. That on the 8th of April, 1871, the steamer Natchez passed up the river and ran so near to said barge, that the swell she raised drove

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libelant's barge violently against the shore and against a sunken spar, which was forced through the side of the barge, making a large hole in her hull several feet below the water line, in consequence of which she sank in a few minutes, and with her cargo worth \$4,144.88, was entirely lost to libelant, and for that sum he asked a decree.

The answer alleged that when the Natchez passed the barge, she was in the usual channel for ascending steamers, where she had the right to be; that the coal barge was not properly and securely moored and fastened and properly braced from the bank, and that she was not moored at a safe and proper place, and that it was by reason of the careless and negligent manner in which the barge was moored and braced, and the improper place where she was moored, that she was driven upon the sunken spar and so broken as to sink, and that claimants were in no manner to blame for the injury and damage.

Mr. B. Egan, for libelant.

Messrs. C. B. Singleton and R. H. Browne, for claimants.

WOODS, Circuit Judge. The evidence satisfies me that if due and usual diligence had been used in mooring the barge and bracing her from the bank, the accident which caused the loss of the barge could not have happened. It appears to be necessary, in order to keep barges moored at the bank from being violently driven on shore by the swell of passing boats, to brace them off from the bank with spars, and it is the invariable custom to do this.

It appears from the evidence of Charles Walker, one of libelant's witnesses, that before the Natchez passed up the river the coal-barge had, at the time of the passage of a small stern-wheel steamer, the *Lessie Taylor*, tripped one of her spars, and while the spar was in that condition the Natchez passed. The effect of the passing of the Natchez was to make a swell and swing the barge against the bank.

This evidence is corroborated by the testimony of Charles Walker, also a witness for libelant.

Small stern-wheel steamers like the *Taylor* do not make

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sufficient commotion in the water to disturb the coal barges, if they are properly moored and braced. The bracing of the barge must have been defective or the spar would not have tripped and become useless by reason of the passing of the Taylor. Had the barge been skillfully and properly braced, her spars could not have been displaced, and the damage that was caused by the passing of the Natchez could not have occurred.

The Mississippi river is a public highway, open and free for the passage of all classes and sizes of water-craft. They have the right to follow the usual channels, and it is incumbent on those who have rafts, barges or other water-craft moored to the banks to foresee and provide against accidents liable to result from the swell of passing steamers: *Williams v. Wilcox*, 8 Ad. & Ell., 314; *Morrison v. Thurman*, 17 B. Munroe, 249; *Sherlock v. Bainbridge*, 41 Ind., 35. The Natchez was in the usual channel for ascending steamers. The proximate cause of the injury and damage was the carelessness and unskillfulness of those in charge of the mooring and bracing of the barge. The steamer was where she had the right to be. She did not transcend her own rights or invade those of others, and she cannot be held responsible for the injury. Libel dismissed.

IN RE FREDERICK REIS.

In Louisiana the privilege of a landlord for rent, upon the goods of his tenant, is lost by their destruction by fire, and does not attach to the insurance money.

This was a contest between two creditors of the bankrupt.

The only assets of the bankrupt estate were about \$1,000 in cash in the hands of the assignee, being the insurance received on certain goods and chattels which had been the property of the bankrupt, and had been destroyed by fire. Pohlman, one of the creditors, claimed to have a privilege on the fund by

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reason of the fact that he had been subrogated to the lien of the landlord of Reis upon the goods destroyed, which had been in the leased premises. The other creditor, Berthel, claimed by virtue of an attachment issued more than four months before Reis had been adjudicated a bankrupt, and by virtue of which the insurance money had been seized.

J. Tharpe, for Pohlman.

Messrs. A. Sambola and P. A. Ducros, Jr., for Berthel.

WOODS, Circuit Judge. If Pohlman has any lien at all, it is the elder and therefore the better one. The controversy turns upon the question whether Pohlman has any lien at all upon the fund. And this presents the question whether the lien of the landlord upon the goods of his tenant remains after the goods are destroyed by fire and then attaches to the insurance money. The jurisprudence of this state does not sanction such an idea. The lien and privilege is lost by the destruction of the property: Civil Code, art. 3277; *Thayer v. Goodale*, 4 La., 221; *Eymar v. Lawrence*, 8 La., 42; *Slark v. Broom*, 7 La. An., 337. Such is also the rule of the French law: 4 Troplong Priv. & Mort., Nos. 889, 890; 20 Duranton, No. 328.

As Pohlman has lost his privilege by reason of the destruction of the property on which it rested, the claim of Berthel to priority of payment must be allowed. Decree of the district court affirmed.

WILLIAM B. BOOTH v. THE SUCCESSION OF AMANDA B. SMITH.

Where the payee and owner of a promissory note has voluntarily destroyed the same, he cannot recover judgment against the maker either upon the note itself, or upon the debt which was the consideration for which the note was given.

ACTION AT LAW.

This cause was heard upon a peremptory exception to the petition, of which the following was a copy:

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"To the Honorable the Circuit Court of the United States for the Fifth Judicial Circuit and District of Louisiana. The petition of William B. Booth, an alien, subject of the Queen of Great Britain and Ireland, residing in the parish of Plaquemine, in this state, with respect represents: That the succession of Mrs. Amanda H. Smith, now under administration in the parish court for the parish of Plaquemine, in this state, and whereof Mrs. Caroline Reddick, wife of William S. Reddick, is administratrix, she being a citizen of the said state of Louisiana, is justly and truly indebted unto your petitioner in the full sum of five thousand dollars with interest and cost for this, viz.: That on the first day of July, 1876, a settlement of accounts took place between your petitioner and said deceased at the residence of said deceased in said parish of Plaquemine, wherein your petitioner claimed a sum in excess of five thousand dollars for money advanced to, and for the benefit of said deceased, and said deceased admitted a balance in favor of your petitioner of five thousand dollars, and in settlement thereof gave unto your petitioner a certain promissory note for said sum of five thousand dollars to bear interest at the rate of six per cent per annum from the first day of July, 1876, and payable in one year after date.

"Your petitioner further represents that he is unable to produce and file said promissory note by reason of the same having been destroyed by petitioner on the fifth day of July, 1876, that the said sum is justly due and owing to your petitioner by the estate of the said Amanda H. Smith, who departed this life in said parish of Plaquemine, in November, 1876, and that although legal demand therefor has been made, said administratrix refuses to pay your petitioner said sum or to acknowledge him as a creditor." Then followed a prayer for judgment.

The exception taken to the petition was as follows: "Plaintiff, by his own showing, has no cause of action against defendant."

Messrs. Joseph P. Horner and W. S. Benedict, for plaintiff.
Mr. E. Howard McCaleb, for defendant.

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Woods, Circuit Judge. The exception must be sustained. Applying the rule that a pleading should be most strongly construed against the pleader, the petition in effect avers a voluntary destruction by the plaintiff of the evidence of the debt, to recover which his suit is brought. In such a case there can be no recovery, based either on the instrument itself or on the debt, which was the consideration for which the instrument was given: *Angell v. Felton*, 8 Johns, 149; *Vanauken v. Hornbeck*, 2 Green (N. J.), 179; *Fisher v. Mershong*, 3 Bibb., 527; *Blade v. Noland*, 12 Wend., 173; "*Joannes*" v. *Bennett*, 5 Allen, 173; *Broadwell v. Styles*, 3 Halst. N. J. L. 58; Rev. Civil Code, art. 2279; Code Nap., art. 1348; *Nagel v. Mignot*, 7 Martin, 657.

Judgment accordingly.

NEW ORLEANS NATIONAL BANKING ASSOCIATION v. JOHN I.
ADAMS ET AL.

1. The act of congress of Feb. 18, 1875 (18 Stat., 820), which is incorporated in section 5198 Revised Statutes, does not confer exclusive jurisdiction upon the courts of the United States to try the actions therein referred to.
2. Under the jurisprudence of Louisiana the proceeding to cause the erasure of a mortgage is properly instituted in the proper court of the parish wherein the mortgaged premises lie.
3. By the same jurisprudence, a mortgage may be erased in a proceeding by rule.
4. To maintain the plea of *res judicata*, the judgment must be final; if it is open to appeal, the plea will not hold.

IN EQUITY. Heard on bill, plea, replication and testimony.

The bill recited that, on or about February 24th, 1860, the said Bank of New Orleans became the holder and owner of certain promissory notes for the sum of \$5,000, made by Robert Tucker and others, payable to the order of Robert Tucker, and by him indorsed; that said notes were secured by mortgage of the same date, which was recorded in the mortgage office of the parish of Lafourche, where the mortgaged

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property was situate, on the 24th February, 1860; that on September 4, 1866, the bank brought suit on said note against Tucker, the maker, praying for judgment against him, and for a sale of the mortgaged property. In June, 1866, the district court of the parish of Lafourche rendered judgment in recognition of said bank's right of mortgage for the full amount of said notes; and a writ of *fiери facias* was issued and the property seized and sold, and adjudicated to one Albert N. Cummings, for the price of about \$13,000. On September 7, 1867, Cummings being unable to comply with his bid in cash, it was agreed between him, Tucker, and the Bank of New Orleans, they then being the sole parties interested, that Cummings should be allowed a certain time to pay the said price on the following terms: that he should pay to one Gaubert the sum of \$1,851, in satisfaction of a judgment he held against Tucker, which was secured by mortgage and vendors' lien on a part of the mortgaged premises; that he should pay one Barnsley \$9,400, and the residue, \$6,269.50, to the said Bank of New Orleans. It was further agreed that the claims of Barnsley and the Bank of New Orleans were to be secured by mortgage upon the whole of said tract of land, and that the claims of Gaubert and others were entitled to a mortgage preference on the lower three arpents. It was also agreed that the original mortgage and privilege securing said notes and claims of the Bank of New Orleans and Barnsley, as aforesaid recorded in the mortgage office on February 24, 1860, should remain in full force and effect, and the present privileges and mortgages were declared to exist and were recognized by said agreement as operating against said property. All this was done by authentic act duly recorded in the office of the recorder of mortgages for the parish of Lafourche on September 12, 1867.

Gaubert's debt had been paid, and the claims of the present complainants and Barnsley were secured under the registry of that agreement. The bill further alleged that the defendants claimed a mortgage privilege in preference to complainant, and he prayed that his mortgage claim be recognized as

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having a priority over all the claims of the defendants, and for a sale under said agreement, treating it as a mortgage.

To this bill a plea was filed by the defendants, wherein they recited that, on July 20, 1875, they being the holders of seven promissory notes secured by mortgage upon the property described in the complainants' bill of complaint, instituted a certain suit or action against Thomas J. Daunis in a court of competent jurisdiction, and obtained from the said court a writ of seizure and sale against said property, to which they were entitled under the laws of Louisiana; that the said writ was issued to the sheriff of the parish of Lafourche, in pursuance of which he proceeded to sell, after all the legal requirements were complied with, and the property was adjudicated to John I. Adams, who was the last and highest bidder; that the said sheriff thereafter declined to make a title to said property on account of sundry inscriptions of mortgages and privileges, among which were those set up in the bill of complaint; that on October 19, 1875, the defendants appeared before the judge of the Fifteenth Judicial District Court and obtained a rule *nisi* against the complainant in this bill and others, as the owners of the inscriptions and mortgages, to show cause why they should not be canceled and erased, that being the proper course of practice in the courts of Louisiana, and that the said court had jurisdiction exclusively over all questions affecting the legality, reality, inscription and effect of all said inscriptions, judgments and mortgages; that upon the hearing of said rule, the complainant was present, and the case was submitted to the court; that on December 18, 1875, judgment was rendered in favor of these defendants and against the complainant in this case, declaring that the mortgages and inscriptions set forth in the present bill of complaint, should be canceled and erased so far as the said property described in the bill of complainant is concerned, finally settling and closing all issues between the complainant and defendants herein, as set up and alleged in said bill; that on December 18, 1875, the judgment was signed by the judge, and no appeal having been taken within the legal delay allowed by the law of Louisiana for an appeal to be

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taken, the said judgment became final; and that said judgment has the force of *res judicata*.

To this plea replication was filed, and the case, so far as these parties were concerned, was submitted by agreement upon the bill, the plea, the replication and the evidence.

It appeared that the judgment upon the rule, which was the basis of the plea of *res judicata*, was signed on December 18, 1875. It seemed by the record, which was made evidence (being a transcript of record from the fifteenth judicial district court), that the complainant, who was defendant in the rule, appeared and pleaded various matters against the same, both by way of exception and upon the merits.

Messrs. J. D. Rouse and Wm. Grant, for complainant.

Messrs. J. P. Hornor, W. S. Benedict, F. W. Baker, Clay Knoblock, Thos. Allen Clarke, T. L. Bayne, and Henry Renshaw, Jr., for defendants.

BILLINGS, District Judge. It is urged in the first place that the court which rendered this judgment had no jurisdiction; that the complainant could not be sued or proceeded against in a court holding its sessions in the parish of Lafourche, first by reason of the United States statute which provides, by way of amendment to section 5198, "that suits, actions and proceedings against any association under this title, may be had in any circuit, district or territorial court of the United States, held within the district in which said association may be established; or in any state, county or municipal court in the county or city wherein the association is located, having jurisdiction in similar cases." Section 5198, to which this clause is amendatory, provided that actions might be brought against national banks to recover twice the amount of usurious interest. These are the only cases, so far as I can discover, which are expressly authorized by the title 52 with reference to national banks.

This amendment does not exclude other forums, and relates only to actions expressly authorized by that title, and this action is not one of them.

Second. That the said court had not jurisdiction over the

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complainant, by reason of the statutes of the state of Louisiana which regulate the forum for actions: Code of Practice, art. 163. In *Gravier v. Baron*, 4 La., 240, the Supreme Court of this state says: "Actions to foreclose mortgages, with all the incidental proceedings, are properly brought in the forum where the mortgaged property is situated." The proceeding, therefore, to cause the erasure of these mortgages was in the proper forum.

It is urged in the third place that the court rendering this decree had no jurisdiction, because the procedure was by rule. The rule is in the nature of a petition, and notice of the rule conforms very nearly to the textual provisions of a citation. But I shall consider this objection as if the incidental proceeding had been instituted as an ordinary rule, and the question is whether, according to the laws of Louisiana and the construction given to these laws by the Supreme Court of this state, mortgages can be erased by rule, as an incident to the foreclosure and sale? The case of *Merrick v. McCausland*, 24 La. An., 256, is conclusive, if this court has to take that decision as a guide.

It is urged that the Supreme Court of the United States in the case of *Marshall v. Knox*, 16 Wall., 557, have held that such procedure could not be taken by way of a rule. But that case, so far as this point is concerned, simply decided that in bankruptcy proceedings, where the object was to compel a seizing creditor whose claim was for rent, and who had instituted his proceeding in the state court and got possession of the property through the sheriff before the bankruptcy proceeding, to deliver up certain property to the assignee; and where the creditor thus situated had not made himself a party to the bankruptcy proceedings, he could not be brought in by rule, but must be sued in the form of a direct action. But that decision has nothing to do with the correctness of this procedure, which pertains to the proper manner pointed out by the Louisiana code, for causing mortgages to be erased, and I am necessarily referred to the Louisiana statutes and the decisions of our Supreme Court. Earlier decisions were against the propriety of the rule, but the last decision on this

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subject in *Merrick v. McCausland*, 24 La. An., *supra*, lays down as correctly stated in the syllabus, that "a judicial mortgage creditor of an inferior rank to that of a conventional mortgage creditor, may proceed by rule against the latter to show cause why his conventional mortgage should not be erased without proceeding by a direct action to set aside the conventional mortgage." It undoubtedly overrules the case of *Bank of Louisiana v. Delery*, 2 La. An., 650. In *Leffingwell v. Warren*, 2 Black, 603, Mr. Justice Swayne lays down the following propositions: "The construction given to a statute of a state by the highest judicial tribunal of the state, is regarded as part of the state law, and are as binding on the courts of the United States as the text." "If the highest judicial tribunal of the state has adopted new views as to the proper construction of the state statute and reversed its former decision, this court will follow the latest settled adjudications."

I consider, then, that it is settled by the Supreme Court of Louisiana that this procedure might properly be taken by rule.

This disposes of the question presented which involved the jurisdiction of the court, my conclusion being that the court had jurisdiction. The next question is, does the decree present a case of *res judicata*? Article 2286, Civil Code, gives a complete definition of what would maintain the plea of *res judicata* so far as the subject matter and the parties are concerned: "The thing demanded must be the same, the demand must be founded upon the same cause of action; the demand must be between the same parties, formed by them against each other in the same quality."

I have no difficulty in coming to the conclusion that the cause of action was the same in both cases. The question presented here, and the question presented in the state court, was as to the binding force of the judgment, and the recorded agreement immediately subsequent thereto. The facts recited in the rule, and the issue relied upon in the answer, present the same facts and the same issue as here. The decision of the state court was, in effect, that the sale under the judgment to Cummings extinguished the mortgage note, and that what-

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ever validity the judgment and the recorded agreement had, could only be from the date of inscription, which was subsequent to the mortgage under which Adams, the respondent here, holds. The whole transaction of the extension given to Cummings and the recording of the judgment and agreement was indivisible, and the court of the Fifteenth judicial district decreed in substance that it created no mortgage prior to that of the defendants here. The parties are clearly the same, and appear in the same quality in both proceedings. But not only according to the common law, but under our code, to maintain the plea of *res judicata*, the judgment relied upon must be final. Civil Code, article 3556, subdivision 31, declares: "The thing adjudged is said of that which has been decided by a final judgment, from which there can be no appeal, either because an appeal did not lie, or because the time fixed by law for appealing has elapsed, or because it has been confirmed on an appeal."

To be sure these definitions are declared to be given with reference to the terms of law implied in the Civil Code, but the courts of Louisiana refer to them and adopt them with reference to all judicial proceedings.

In the case of *Escurix v. Daboval*, 7 La., 575, it was held by Judge Martin that a judgment quashing an execution has not passed *in rem judicatum* when the matter in dispute is sufficient to authorize an appeal, and when a year has not elapsed from the date of it to the time of the trial when it is offered as evidence to show the writ was properly quashed.

The case in the Fifteenth judicial district court was clearly appealable, and a motion for an appeal, according to the record, had been made. It does not appear whether it was ever perfected. The judgment was rendered on December 18, 1875, and this plea was filed in this cause on November 3, 1876. The year within which an appeal could have been taken had not then expired. That the decree appears to have been executed by the actual erasure of the incumbrances from the record does not change the case, for if an appeal has been taken, and the decree should be reversed, the very judgment

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of reversal by the Supreme Court would, so far as these parties are concerned, re-instate the mortgages.

If the appeal from the judgment in the state court has not been perfected, the defendant may amend his plea by setting up that fact.

LEON GRAND V. THE BARK IBIS.

1. Where a vessel is chartered for a voyage for a round sum, the charterer has the right to load the vessel himself, or allow others to do it under the contract with him. In the latter case, the goods placed on board by third persons, under such contract, are liable only for their own freight and not for the gross sum named in the charter-party.
2. This rule is not changed by the following clause inserted in the charter-party, viz.: "Bills of lading to be signed when presented without prejudice to this charter-party."

ADMIRALTY APPEAL.

The facts were these: On January 15, 1876, one J. M. Oriol, a merchant of New Orleans, entered into a contract of charter-party with A. N. Christensen, master, whereby he chartered the bark Ibis for a voyage from New Orleans to Liverpool, England, for the carriage of a full cargo of timber or other merchandise to be furnished by Oriol. In consideration whereof Oriol agreed to pay the gross sum of £1,150 sterling in cash, on right delivery of cargo at port of discharge, etc. The charter-party also contained this stipulation, "It is also agreed that this charter-party shall commence when the vessel is ready to receive cargo * * and end on the right delivery of cargo and payment of freight at the port of discharge; bills of lading to be signed when presented without prejudice to this charter-party."

Without any knowledge of the terms of this charter-party, the libelant contracted with Oriol, the charterer, for the carriage of a quantity of lumber, in logs, to Liverpool, at the rate of 60 shillings sterling per load of 50 cubic feet queen's calliper measure, and in pursuance of said contract sent to

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the bark lots of white ash, white oak, walnut and black walnut logs of the value of about \$5,000, and the same were received and stowed on board. The libelant then caused bills of lading to be made out for the logs, "according to his contract with Oriol, and sent them to the master of the bark for signature. He declined to sign the bills on the ground that he had chartered his vessel to Oriol for a round sum, and that he would not sign said bills unless they contained the clause "as per charter-party."

Afterwards, libelant having been advised that he would only be liable for the freight on his lumber, agreed to accept the bills of lading with the clause above mentioned inserted therein; but the master of the bark then refused to give bills of lading unless they expressly stipulated that the vessel should have a lien upon libelant's said merchandise for any deficit that might remain unpaid of the round sum for which she was chartered by Oriol.

The bark sailed with the merchandise of libelant on board, without having given any bills of lading.

The merchandise of the libelant was conveyed to Liverpool by the Ibis, and arrived May 22, 1876, and was there sold for the freight due on the charter-party, and brought the sum of 1,032 pounds, 2 shillings and 7 pence sterling.

The freight on the cargo, exclusive of the merchandise of libelant, amounted to the sum of 500 pounds, 14 shillings and 9 pence.

The libel prayed for a decree against the bark for the value of the merchandise shipped by libelant.

Mr. Joseph P. Horner, for libelant.

Mr. Charles B. Singleton, for respondent.

Woods, Circuit Judge. The question presented is whether, under the circumstances of the case, the respondent had a lien upon the merchandise of libelant for the payment of the gross sum mentioned in the charter-party, or whether it was only liable for its own freight. If the former, then the respondent is only liable for so much of the proceeds of libelant's merchandise as remained after satisfying the sum due

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on the charter party ; if the latter, then the respondents are liable for the value of the merchandise in Liverpool, less the freight from New Orleans.

The general rule unquestionably is that, where a vessel is chartered for a voyage for a round sum the charterer has the right to load the vessel himself, or allow others to do it under contract with him, and the goods so placed on board by third persons under such contract, are liable only for their own freight, and not for the payment of the gross sum named in the charter-party: *Perkins v. Hill*, 2 Wood. & M., 158; 1 Parsons on Shipping and Admiralty, 301, notes 1 and 2; *Drinkwater v. Brig Spartan*, 1 Ware, 156; *Faith v. East India Co.*, 4 B. and Ald., 630.

But it is claimed in this case, that the clause in the charter-party whereby the master agreed to give bills of lading "without prejudice to this charter-party," changes the general rule and implies that goods put on board not belonging to the charterer, shall be liable for the gross sum mentioned in the charter-party, and not merely for their own freight.

I think the authorities are adverse to this construction of the charter-party.

In the case of *Paul v. Birch*, 2 Atk., 621, it was held by Lord Hardwicke that where the charterers had bound the goods for the payment of the hire or freight and afterwards become bankrupts, full effect should be given to that clause as against the assignees. But an attempt was made to charge the goods of third persons who were shippers under the charterers, with the full amount of the hire or freight. This last claim was resisted, and Lord Hardwicke held that these latter goods were liable only to the extent of the freight payable to the charterers by the shippers.

So in the case of *Kerford v. Mondel*, 5 Hurl. & Nor. (Ex.), 931, the managing owner chartered his ship for a voyage to Central America, and return, at certain specified rates of freight, with a provision that the master might sign bills of lading without prejudice to the charter-party. And it was agreed that for the security and payment of all freight, dead freight and other charges, the master or owner

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should have a lien on the cargo or goods laden on board. On her homeward voyage one Larraondo shipped certain bags of sugar and cochineal, and took separate bills of lading whereby the goods were deliverable "on payment of freight and carriage as agreed." These bills of lading were signed by the master in pursuance of the charter-party. On tender of the amount due for carriage of the sugar and cochineal, the master refused to deliver, claiming a lien for dead freight under the charter-party. Trover was brought to recover the value of the goods. Watson, Baron, said: "The real question agitated between the parties is, whether there was a lien for dead freight under the circumstances. Now, in the original charter there was a lien for dead freight, but the master was to sign bills of lading for goods shipped on board the vessel, and the goods were shipped on board the vessel, and in the bill of lading there was no lien for dead freight, but merely for freight (*i. e.*, freight for carriage) as agreed. It is perfectly clear that does not apply to dead freight. The price is for the carriage of goods. It would be a monstrous supposition that a man who shipped 100 pounds of goods on board a vessel should be held responsible for 1,500 pounds dead freight.

The fair construction of the clause in the charter-party under consideration, by which the vessel, her freight and appurtenances, and the merchandise laden on board, are bound to each other for the performance of the charter-party, and that "bills of lading, when presented, are to be signed without prejudice to this charter-party," is not that the goods of third persons shall be liable for the entire freight, but only for their own freight, and that the clause binding the cargo should only extend to the cargo of the charterer.

In accordance with these views, there must be a decree in favor of libellant for the value of his logs in Liverpool, less the freight thereon from New Orleans, and the costs in both the district and circuit court.

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APRIL TERM, 1877.

ANDREAS CULBERG ET AL. V. THE TOWBOAT CONTINENTAL.

1. A tug with two tows descending the Mississippi river caused one of her tows to collide with another tug anchored within 500 feet of the bank, at a place where the river was three-fourths of a mile wide. *Held*, that these facts unexplained throw the fault on the descending tug.
2. When a boat is lying at anchor it is not necessary or proper for her to respond to the signals of passing steamers.

ADMIRALTY APPEAL.

Messrs. Jos. P. Hornor and W. S. Benedict, for libelants.*Mr. B. Egan*, for claimant.

Woods, Circuit Judge. The libelants, who were the owners of the Swedish bark Marguerite, brought this libel to recover \$28,500, the estimated damage which was caused to their bark by a collision which they allege took place through the fault of the officers and crew of the tow-boat.

On the afternoon of March 3, 1874, the Continental left the city of New Orleans for the mouth of the Mississippi river, having in tow the bark Bygdo lashed to her starboard side and the bark Marguerite lashed to her port side. About four o'clock the next morning the Continental with her tows ran into another tow-boat, the Rio Grande, which was lying at anchor in the river with two tows lashed to her, one on each side. The result of the collision was a considerable damage to the bark Marguerite.

The fact that the collision occurred with a boat lying at anchor, if she was in her proper place, would seem to make a *prima facie* case of negligence against the Continental, and without explanation, to establish a claim for damages.

The respondent has attempted to excuse the fault of the collision by throwing the blame upon the Rio Grande. It is alleged by way of excuse that the tow of the Rio Grande was anchored in the middle of the river at a place where the river was three-quarters of a mile wide, instead of being anchored near one or the other of the banks. This is disputed by libelants.

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The witnesses who speak directly to this point are Captain McClellan, of the Rio Grande, John Robinson, Theodore Crowell and J. E. Esnort. That she was not so anchored, but on the contrary, was anchored within four or five hundred yards of the right bank of the river is shown by the decided weight of the testimony.

To rebut this evidence, the captain of the Continental, Robert West, says that the Rio Grande was anchored at the time of the collision about the middle of the river as near as he could judge.

Reyberg, the master of the bark Marguerite, also testifies that the general course of the Continental was down the middle of the river.

The libel itself alleges that the Continental was running down the middle of the river, that she descried lights ahead which were discovered soon after to be borne by a tow at anchor, consisting of the tow-boat Rio Grande with her tows, that some time thereafter, the said tow-boat Continental ran the said bark Marguerite into the said tow lying at anchor.

It is on the evidence of these two witnesses and the averments of the libel that respondent relies to rebut the proof that the Rio Grande was near and within four or five hundred yards of the right bank of the river.

The libel and the witness Reyberg both speak of the position of the Continental some time before the collision occurred. West, the captain of the Continental, is the only witness who speaks of the place in the river where the collision occurred, and he qualifies his testimony by saying "as near as I could judge."

This evidence can not overcome the testimony of so many witnesses who say that the Rio Grande was within four or five hundred yards of the right bank of the river.

It seems to me that this point settles the case. If the Continental had kept her proper place in the river; had followed its thread as was her duty, the collision could not have occurred.

But I am satisfied, from a perusal of the evidence, that the other faults charged against the Rio Grande are not sustained. The decided weight of the evidence is against the charge that

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the Rio Grande and her tows kept up their running lights while at anchor and thus deceived the officers of the Continental. Complaint is made that the Rio Grande did not answer the whistle of the Continental. Being at anchor it was not necessary or proper for her to respond.

Complaint is also made of the management of the Rio Grande by her officers when the collision was imminent. Even if there had been mistakes made, which is strenuously denied, there is no question that when the officers of the Rio Grande saw the danger of collision they did their best to avoid it. The fault lies further back, with the officers of the Continental who seem to have been bewildered and to have lost their reckoning, and instead of keeping the middle of the river, veered over to the starboard side and ran into a tow at anchor.

In my judgment, the sole fault is with the Continental, and her owners must pay the loss.

There seems to be no dispute about the amount of damage suffered by the Marguerite. It was placed in the district court at \$2,500. Let there be a decree for that sum, and costs of both courts in favor of libelants.

TRUSTEES OF THE LOUISIANA PAPER COMPANY v. RUFUS
WAPLES.

The general law under which a corporation was organized declared:

“No stockholder shall ever be held liable or responsible for the contracts or faults of such corporation in any further sum than the unpaid balance due to the company on the shares owned by him.”

The charter of the company prescribed in what installments forty per cent of the stock should be paid, and then declared: “The balance on each share, or any portion of such balance, shall not be called for unless with the assent of three-fourths of the stockholders, and then only to increase the business of the company.” *Held*, that after payment by a stockholder of forty per cent of his stock, he was not liable to the company, or its creditors, for the residue or any part thereof, unless the same had been called for by a vote of three-fourths of the stockholders.

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ERROR to the district court.

The action was brought in the district court by the trustees in bankruptcy of the Louisiana paper manufacturing company, to recover of the defendant, who was a stockholder in the company, a balance alleged to be due and unpaid on his subscription of stock.

The company was established under a general law of this state (Rev. Stat., p. 183) which provided for the organization of corporations for works of public improvement, manufacturing and other purposes, by the adoption of a charter by the stockholders, and which directed that every charter should contain, among other things, the name of the corporation, its domicile, a description of the business which it proposed to carry on, a statement of the amount of the capital stock, the ~~number~~ of shares, the amount of each share, and the time when and the manner in which ~~payment on stock~~ subscribed should be made. The law also provided that the charter of corporations organized under it should be recorded in the office of the recorder of mortgages and published in a newspaper at the domicile of the corporation, once a week for at least thirty days. The statute also declared: "No stockholder shall ever be held liable or responsible for the contracts or faults of such corporation in any further sum than the unpaid balance due to the company on the shares owned by him."

The third section of the charter of the Louisiana paper manufacturing company declared, "the capital stock of this corporation is hereby fixed at the sum of sixty thousand dollars, divided into six hundred shares of one hundred dollars each; twenty-five dollars on each share to be paid at the time of the organization of this corporation, and five dollars on each share in thirty days, five dollars in sixty days, and five dollars in ninety days after said organization. The balance on each share, or any portion of such balance, shall not be called for, unless with the assent of three-fourths of the stockholders, and then only to increase the business of the corporation.

The defendant subscribed twenty-five shares, and paid up the installment of twenty-five dollars and the three install-

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ments of five dollars each, mentioned in said third section, making a total of forty per cent of the stock subscribed.

The suit was to enforce the payment of the remaining sixty per cent of the stock for the benefit of the creditors of the corporation.

No meeting of the stockholders had ever been held to give their assent to the calling in of the unpaid sixty per cent of the stock subscribed, nor had such assent been given.

The defense was that the sixty per cent sued for was subscribed and to be paid only according to the terms of the charter, on condition that it should not be called in unless with the assent of three-fourths of the stockholders, and then only to increase the business of the corporation, and that such assent had never been given.

The district court charged the jury that there was no liability of the defendant beyond the forty per cent of his stock paid up, unless the remaining sixty per cent, or some part of it, had been called in by the assent of three-fourths of the stockholders, for the purpose of increasing the business of the corporation.

This charge is assigned for error.

Mr. J. Ad. Rosier, for plaintiff in error.

Mr. L. Madison Day, for defendant in error.

Woods, Circuit Judge. This is not the case where there has been a subscription of stock, and the by-laws or other regulations adopted by the stockholders or directors prescribe how the subscriptions shall be called in, or the charter itself declares in what installments the directors may call in the stock payments.

In such a case, there can be no doubt that the entire stock subscribed, whether called in by the directors or not, is a fund for the satisfaction of the debts of the corporation, and its payment can be enforced. Such regulations only pertain to the administration of the affairs of the corporation.

In this case the charter, which was required to be recorded in a public office, and published in a newspaper at the domicile of the corporation, prescribed the installments by which

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forty per cent of the stock subscribed should be paid, and then declared that the residue, or any portion thereof, should not be called for unless with the assent of three-fourths of the stockholders, and then only to increase the business of the corporation.

The rule with regard to unpaid subscriptions of stock is this, that whatever sum is subscribed by the stockholders, and held out to the public as the stock of the corporation, is liable to be called in for the payment of its debts, even though the directors may refuse to make the call: *Purton v. N. O. & C. Railroad Co.*, 3 La. An., 19.

The power conferred upon directors to call in installments upon the shares, is a discretionary power; but that discretion is merely modal relating to the time and manner of making payments. When the wants of the company require those payments, it becomes the duty of the directors to cause them to be made, as much so as to require payment of debts due the company. It is not discretionary with the directors to say whether or not the debts of the company shall be paid when they have the power to compel payment: *Ward v. Griswoldville Man. Company*, 16 Conn., 601.

These doctrines are well established. Do they apply to the case in hand? It is to the charter of a corporation that reference is to be made to determine the rights of the public: *Stark v. Burke*, 9 La. An., 341.

Now, looking at the charter of the Louisiana paper manufacturing company, what was the contract which the public was advised the stockholders had entered into with the corporation? Not to pay their subscriptions absolutely, nor to pay them when, in the discretion of the directors, it might be necessary for the wants of the company. No obligation was assumed to pay any more than forty per cent of the stock subscribed, unless upon the vote of three-fourths of the stockholders, and then for a particular purpose. Clearly, as between the corporation and the stockholders, the unpaid stock above forty per cent could not be called in except on the terms prescribed by the charter. The public, the creditors of the corporation, are in no stronger position than the

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corporation itself, for the charter which informed the public of the amount of the capital stock of the corporation, also gave notice that the stockholders were under no obligation to pay more than forty per cent, except on their own vote, carried by a majority of three-fourths, and for a particular purpose.

If the directors had called a meeting of the stockholders to vote on the question of calling in the unpaid sixty per cent of the stock, and the stockholders had refused their assent, would it have been the duty of the directors, would they have had any power, to call it in, notwithstanding the adverse vote? Clearly not. Is their duty to call in the stock any clearer, or their power any greater because no such meeting has been called and no such vote taken?

The stockholders have made their contract with the corporation, the public have been explicitly advised of its terms, and the stockholders, therefore, can only be held to perform what they have agreed to do. The company can claim no more, nor can the creditors of the corporation say they have been misled.

In my judgment, the stockholders are not liable to pay the unpaid sixty per cent until the same has been called in by a three-fourths vote of the stockholders, for the purpose of increasing the business of the corporation. Such residue is not due until after such a vote, and the law of this state declares that the stockholder of an incorporated company is only liable to the company for the unpaid balance due to the company on the shares owned by him. The following authorities have been consulted, and tend to sustain the views expressed: *Bur. & Mo. River Railroad Co. v. Boestler*, 15 Iowa, 555; *Penobscot & Kennebeck Railroad Co. v. Dunn*, 39 Maine, 587; *Phila. & West Chester Railroad Co. v. Hickman*, 28 Pa. St., 318; *Carlisle v. Cahawba & Marion Railroad Co.*, 4 Ala. N. S., 70.

It results from these views that there was no error in the charge of the district court. Its judgment is, therefore, affirmed.

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THE UNITED STATES v. R. STEWART DENNEE ET AL.

1. Subornation of perjury is in its essence but a particular form of perjury itself.
2. An indictment for subornation of perjury must aver that the defendant knew that the testimony which he instigated the suborned witness to give was false, and that in giving such testimony the witness would willfully and corruptly commit the crime of perjury.

INDICTMENT for subornation of perjury. Heard on demurrer.

The indictment contained two counts. The first alleged the pendency in the United States court of claims, of a suit brought by one Harriet Mills, who claimed to be a loyal citizen of the United States, against the United States to recover from the treasury the proceeds of one hundred bales of cotton which she alleged were her property, and which were taken in August, 1874, by the United States military forces, turned over to the officers of the treasury department, and afterwards sold and the proceeds amounting to \$40,000, paid into the treasury of the United States, and that said court had jurisdiction to pass upon said claim; that on May 10, 1875, at the city of New Orleans, the defendants, R. Stewart Dennee, lawyer, and Samuel Gamage, yeoman, "unlawfully, corruptly, wickedly and maliciously did solicit, suborn and instigate and endeavor to persuade, and did then and there suborn, instigate, and procure one Martha L. Knight to appear before one Robert H. Shannon" United States circuit court commissioner, authorized by law to administer oaths, etc., "and did then and there wickedly and corruptly instigate and procure the said Martha L. Knight to give evidence and her deposition in said issue, * * and upon her corporal oath, duly administered according to law, to falsely swear and give evidence to certain matters material and relevant to the said issue, and to matters therein and thereby put in issue to the effect following, that is to say:"

The first count of the indictment then set out certain questions and the answers thereto, given by the said Knight, which was followed by a traverse of the truth of each and every answer given by her as set out in the indictment.

The count then concluded as follows: "Whereas in truth

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and in fact she, the said Martha L. Knight, on or about, or concerning the matters touching which, she in her said deposition, did declare and testify had no knowledge or belief of the truth thereof in so far as any and all matters by her sworn to, stated and deposed as aforesaid in her said deposition aforesaid, were or are material to the issue so joined in the said court of claims as aforesaid, there and then at no time when she did so swear, depose and her evidence give as aforesaid contrary to the form of the statute, etc.”

The second count set out in substantially the same manner as the first the pendency and nature of the suit of Mills against the United States in the court of claims, the jurisdiction of the court over the cause, and then proceeded to aver that the defendants, at New Orleans, on the 10th day of March, 1875, “did unlawfully, corruptly, wickedly solicit, suborn and instigate, and endeavor to persuade, and did then and there suborn and instigate and procure one Martha L. Knight to appear as a witness in said cause, * * and did so wickedly and unlawfully, as aforesaid, cause and procure the said Martha L. Knight then and there * * to appear before one Robert H. Shannon” who was a commissioner of the United States circuit court, authorized to administer oaths, “and did then and there wickedly and corruptly instigate and procure the said Martha L. Knight to give evidence and her deposition in said issue, * * and to falsely swear and give evidence to certain matters material and relevant to the said issue” to the effect following, that is to say. Then followed a statement of certain questions propounded to the said Martha L. Knight, and her answers thereto under oath and a traverse *seriatim* of each and every answer so set out.

The second count then concluded with the same averments as the first.

The demurrer was based on the alleged ground that the indictment did not set out any offense against the laws of the United States.

Messrs. W. H. Hunt, John Ray and F. W. Baker, for the demurrer.

Mr. John H. New, assistant United States attorney, contra.

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Woods, Circuit Judge. The crime of subornation of perjury has several indispensable ingredients which must be charged in the indictment or it will be fatally defective.

1. The testimony of the witness suborned must be false.
2. It must be given willfully and corruptly by the witness, knowing it to be false.
3. The suborner must know or believe that the testimony of the witness given, or about to be given will be false.
4. He must know or believe that the witness will willfully and corruptly testify to facts which he knows to be false.

A careful scrutiny of the counts of this indictment fails to reveal any averment that the defendants knew or believed that the testimony of the witness whom they are charged with suborning would be false, or that they knew it was false, or that they knew that the witness knew it was false, or that they knew that she would willfully and corruptly testify, or had willfully and corruptly testified to facts as true, knowing them to be false.

To make a good indictment for subornation of perjury the false swearing must be set out with the same detail as an indictment for perjury, and the indictment must charge that the defendants procured the witness to testify knowing that the testimony would be false, and knowing that the witness knew that the testimony he had given, or was about to give, was false, and knowing that he would corruptly and willfully give false testimony.

In the case of *Commonwealth v. Douglass*, 5 Metcalf, 244, the defendant was indicted for subornation of perjury. On the trial the court below instructed the jury that "if it was proved to them beyond a reasonable doubt that the defendant on the former trial for forgery (referred to in the indictment) put Fanny Crossman on the stand or caused her to be put on the stand as a witness, knowing that she would testify as set forth in the indictment, and intending that she should so testify, and he put her on the stand, or caused her to be put on the stand for the purpose of her so testifying, and she did so testify and such testimony was false, and he knew when he put her on the stand, that if she did so testify her testi-

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mony would be false; it would be sufficient to prove that part of the indictment which alleged that defendant suborned Fanny Crossman to commit perjury as set forth in the indictment."

This charge was assigned for error, and the Supreme Judicial Court in passing upon it said:

"The remaining exception to the charge of the presiding judge is of more importance, and is, we think, well founded. The jury were instructed that if certain facts stated in the exceptions were proved beyond reasonable doubt, it would be sufficient proof of that part of the indictment which charged that the defendant suborned Fanny Crossman to commit perjury. Now, we are of opinion that all these facts might exist and yet the defendant might not be guilty of the crime charged in the indictment. The defendant might know or believe—for he could not know with certainty—that the witness whom he called would testify as she did, and he might know that her testimony would be false, but if he did not know that she would willfully testify to a fact knowing it to be false, he could not be convicted of the crime charged. If he did not know or believe that the witness intended to commit the crime of perjury, he could not be guilty of the crime of suborning her. To constitute perjury the witness must willfully testify falsely, knowing the testimony given to be false (1 Hawk., c. 69, sec. 2; Bac. Ab., Perjury A; 2 Russell on Crimes, 1753). A witness, by mistake or defect of memory, may testify untruly without being guilty of perjury or any other crime."

Subornation of perjury is in its essence but a particular form of perjury itself: 2 Bishop on Crim. Law, sec. 1197; see also Wharton's Precedents of Indictments, pp. 598, 599, forms *c* and *d*; see also form of indictment in Archbold's Crim. Pl. and Ev., 575, 577; see same form 2 Bishop's Crim. Procedure, sec. 878; *State v. Carland*, 3 Dev. (Law), 114.

Tested by these authorities, both counts of the indictment are bad, first, because they do not aver that the defendants knew that the testimony which they instigated the witnesses to give was false, and second, because there is no averment that the

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defendants knew that the witness knew that the testimony she was instigated to give was false.

Demurrer sustained.

EZRA WHEELER & CO. v. THE FACTORS AND TRADERS' INSURANCE COMPANY ET AL.

Certain creditors of G., at his instance and cost, took out in their own name and for their own benefit, insurance on his gin house, etc., to secure their debt in case of loss of the gin house by fire. The property insured was burned. *Held*, that a creditor of G. who held a mortgage on the same property, and who, by its terms, was entitled to have the same insured for his benefit at the cost of G., had no claim on the insurance money, even though the parties who took out the insurance had no insurable interest in the property insured.

IN EQUITY. The case of complainants, as stated in the bill, was substantially as follows: The complainants were the holders, by assignment from Foster & Gwynn, of three notes made by the defendant John H. Green, payable to his own order and indorsed by him, one for \$10,000, dated May 23, 1870, one for \$3,723.61, dated May 23, 1871, and one for \$3,009.55, dated March 7, 1872. Each of the notes was secured by a separate mortgage, executed by Green upon the Bell plantation, in Carroll parish, Louisiana. The mortgages, to secure the two notes last mentioned, each contained a clause whereby Green agreed that he would cause to be insured against fire the buildings and improvements on said plantation, until the payment of said two notes respectively, and transfer the policies to the mortgagees; and in default of such insurance the mortgagees might insure said property for their own security and charge the premium to him.

Green, when asked by George Foster, acting for plaintiffs, respecting said insurance, told Foster that he had insured said premises for the benefit of complainants, and afterwards, in January, 1873, Gwynn, of the firm of Foster & Gwynn, called at the office of the defendants Johnson & Goodrich to

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learn whether the policy for the protection of the mortgagees had expired, and if so, to cause a new policy to be taken out, and Gwynn was informed that the property was insured by Johnson & Goodrich, for the protection, as he supposed, of complainants.

Johnson & Goodrich, as the agents and commission merchants of Green, did, in January, 1873, by an indorsement under an open fire policy in the Factors and Traders' Insurance Company, obtain an insurance against fire of said premises for \$5,500 until March 28, 1873, but payable to the merchants of said Green, namely, the said Johnson & Goodrich. On or about March 26, the gin house insured by said policy was destroyed by fire, whereby the insurance company became liable for the loss. The bill further charged that Johnson & Goodrich had no insurable interest in the said premises.

The claim of complainants was that they were entitled to the insurance money, and the prayer of the bill was that the insurance company might be restrained from paying over the money to Johnson & Goodrich or to Green.

Mr. E. T. Merrick, for complainants.

Mr. Thomas Hunton, for defendants.

Woods, Circuit Judge. The case, as made by the bill, is not supported by the evidence. The answers and testimony show that Johnson & Goodrich, at and before the time the insurance was taken out by them, were the commission merchants of Green, and were his creditors in the sum of \$4,629.06; that they desired to have insurance on the gin house and gin stands on the Bell plantation, to secure their debt in case of loss by fire, and so informed Green; that Green assented to their proposition to take out said insurance at his cost, and wrote to Johnson & Goodrich to remind them to take out such insurance. Johnson & Goodrich accordingly indorsed the insurance upon an open policy which they had in the Factors and Traders' Insurance Co. for the sum of \$5,500, payable to themselves in case of loss, and charged the premium to Green.

Neither Johnson nor Goodrich knew of the clauses in the

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mortgages given to secure the notes held by complainants, providing for insurance of said premises; they did not, nor did either of them nor any one in their office, with their knowledge, inform Gwynn that the property was insured for the benefit of the mortgagees or insured for the benefit of any one else; nor did John H. Green ever inform Foster & Gwynn, or either of them, that he had caused the premises to be insured for the benefit of complainants, through Johnson & Goodrich or any one else.

In short, the whole case made by the bill is overturned by the answer and evidence, except the averments that complainants are the holders of three notes of said John H. Green, secured each by a separate mortgage, and that the last two mortgages each provided for insurance of the premises, as above set forth. No insurance was ever taken out by Green for the benefit of complainants. Johnson & Goodrich acted in their own behalf for their own benefit, and took a policy payable to themselves, for the security of their own debt, without any knowledge that Green had ever agreed to insure for the benefit of complainants. By what rule of law or equity the complainants can claim the proceeds of the insurance I do not know.

It is said that Johnson & Goodrich had no insurable interest in the premises. If that is so, the result is that the policy is void. It does not follow that some one else who had an insurable interest, but for whom no insurance had been taken out, is to be substituted in the policy for Johnson & Goodrich. The insurance company made no contract of insurance with the complainants, and they cannot insist on the fruits of a contract to which they were in no manner parties, and which was not made for their benefit.

Bill dismissed.

Mendelsohn v. The Louisiana.

S. MENDELSON V. THE STEAMSHIP LOUISIANA.

WHERE soda, shipped on board an iron steamship at Liverpool for New Orleans, late in the winter, was transported through the Gulf in the warm weather of the early spring, and was damaged by the humidity of the hold, and loss or damage by heat and sweating were among the exceptions of the bill of lading ; *Held*, that the case fell within the exceptions, and the ship was not liable.

TRANSFERRED to circuit from district court, by virtue of section 60, R. S., the district judge having been of counsel for one of the parties.

Messrs. M. Dinkelspiel and F. Michinard, for libelant.

Messrs. J. D. Rouse and Wm. Grant, for claimant.

WOODS, Circuit Judge. The libel alleged the shipment on board the steamship Louisiana at Liverpool, on April 8, 1873, in good order, consigned to libelant at New Orleans, of 500 kegs of bi-carbonate of soda ; that the steamship arrived on May 14, 1873, but failed to deliver the said merchandise in good order, but, on the contrary, that it was deteriorated in value thirty per cent from improper stowage and want of proper care and by water and otherwise, to the libelant's damage \$1,200.

The answer averred that the soda was delivered in the same order as received, and denied improper stowage or any negligence or want of care. On the contrary, it averred that the soda was well stowed and, for greater security, was put in the fore and after holds under the decks ; that the weather was fine during the entire voyage and the ship tight and stanch ; that she did not leak ; made no water, and none got into her hold during the entire voyage, and that if the soda sustained any damage, it was caused by its inherent qualities.

The exceptions in the bill of lading were as follows : " Excepting loss or damage arising from the act of God, the queen's enemies, pirates, robbers, restraints of princes, rulers or people, jettison, barratry of the master or mariners, thieves, vermin, frost, heat, sweating, decay, rain, spray, leakage, breakage or rust, coal or coal dust, fire, steam, machinery or

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boilers or any defect therein, collision, or any other accidents of the seas, rivers or navigation of whatsoever nature or kind."

The evidence is entirely satisfactory to my mind that the goods of the libelant were carefully and properly stowed and that the damage which they suffered was not caused by any carelessness or negligence of the master or seamen, but was caused by the sweating or humidity unavoidable in the hold of an iron ship, loaded in Liverpool in the winter or early spring, and making a voyage to New Orleans through the Gulf in the warm weather of spring.

Such a cause of damage is within the exception, sweating, and also the exception accident of navigation, reserved in the bill of lading; and the ship is not liable for the deterioration of the goods: *Clark v. Barnwell*, 12 How., 272.

The libel must be dismissed at libelant's cost.

THE UNITED STATES v. R. STEWART DENNEE ET AL.

1. An indictment for a conspiracy to do an unlawful act, need not aver the means agreed on whereby the conspiracy was to be carried into effect.
2. An indictment for conspiracy under section 5440, Revised Statutes, which avers the conspiracy and the overt acts done to carry it into effect, is sufficient without stating the means agreed on to accomplish the purpose of the conspiracy.
3. Section 30 of the act of March 2, 1867, entitled "An act to amend existing laws relating to internal revenue, and for other purposes," which is embodied in the Revised Statutes as section 5440, prohibits a conspiracy to defraud the United States, not only by committing some one or more of the offenses described in other sections of the act, but in any manner whatever.

Heard on demurrer to the indictment.

The indictment was found on the 6th day of June, 1876, and was predicated on section 30 of the act approved March 2, 1876, entitled "An act to amend existing laws relating to internal revenue, and for other purposes." (14 Stat., 484.)

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The section declares, "that if two or more persons conspire, either to commit any offense against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be liable to a penalty of not less than one thousand dollars, and not more than ten thousand dollars, and to imprisonment not exceeding two years.

This section is substantially embodied in the United States Revised Statutes as section 5440.

The indictment charged that Harriet A. Mills, spinster, Samuel Gammage, yeoman, R. Stewart Dennee, lawyer, and others, naming them all, late of the said district of Louisiana, being persons of evil minds and dispositions, on the first day of March, in the year of our Lord eighteen hundred and seventy-four, at and within the state of Louisiana, and the district of Louisiana aforesaid, and within the jurisdiction of said court, with force and arms, unlawfully and wickedly did conspire, combine, confederate and agree together and among themselves, and with Martha L. Knight, Joseph P. Murphy,

* * and divers other evil disposed persons, whose names are as yet to the grand jurors unknown, unlawfully and fraudulently to defraud the United States of America of a large sum of money, to wit, forty thousand dollars lawful money of the United States, of the property and moneys of the United States. Then followed averments setting forth, with great particularity and precision, numerous overt acts of the defendants, or some of them, done to effect the object of the conspiracy

The overt acts charged were the prosecution, by suit against the United States in the court of claims, of a false, feigned and fraudulent claim by false and perjured testimony.

The demurrer alleged that the indictment was not sufficient in law, and that defendants were not bound to answer the same.

Mr. John H. New, assistant U. S. attorney, for the United States.

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Messrs. Wm. H. Hunt, John Ray and F. W. Baker, for defendants.

WOODS, Circuit Judge. It is objected to the indictment, that it does not set out and aver the manner in which and the means whereby the object of the conspiracy charged was to be carried into effect, and that the averments setting out the overt acts, done in furtherance of the conspiracy, do not supply this defect.

There is much conflict in the adjudged cases, on the point whether, in an indictment for conspiracy to cheat and defraud, it is necessary to aver the means agreed on to carry the conspiracy into effect.

The affirmative of the proposition has been held in Massachusetts: *Commonwealth v. Hunt*, 4 Metcalf, 111; *Commonwealth v. Eastman*, 1 Cush., 189; *Commonwealth v. Skedd*, 7 Cush., 514; *Commonwealth v. Wallace*, 16 Gray, 221.

It has also been so held in the following cases: *State v. Parker*, 43 N. H., 83; *State v. Roberts*, 34 Maine, 320.

In the case of *Lambert v. The People*, 9 Cowen, 578, the indictment being for a conspiracy to cheat and defraud, etc., without averring specifically the means to be used, the court for the trial of impeachments and errors was equally divided on the question whether the indictment was a good one or not, it was decided by the casting vote of the president, that it was defective, and the judgment of the Supreme Court sustaining it reversed.

On the other hand, it is the settled English rule that the words "unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together to cheat and defraud" one "of his goods and chattels," contain a sufficient allegation of conspiracy, without mention of any means intended: 2 Bishop on Criminal Law, section 200, and cases there cited. See also, *Rex v. Gill*, 2 B. & Ald., 204; *Rex v. Seward*, 1 Adol. & E., 706; The same doctrine is held in the following American cases: *People v.*

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Richards, 1 Mich., 216; *The State v. Younger*, 1 Dev., 357.

A somewhat careful consideration of the authorities convinces me that the better reason is with those who deny the necessity of setting out the means by which the conspiracy was to be carried into effect.

But it seems clear that the statute upon which this indictment is based was intended to relieve the pleader from any supposed necessity of setting out the means agreed upon to carry out the conspiracy, by requiring him to aver some act done in furtherance of the conspiracy, and making such act a necessary ingredient of the offense.

In the case of *Commonwealth v. Shedd*, 7 Cush., 514, the court said, that "the great difficulty in giving effect to the allegation of overt acts in an indictment for conspiracy on a motion in arrest of judgment for insufficiency of the indictment, is this, that overt acts are merely alleged by way of aggravation of the offense, and though alleged, they need not be proved, and the alleged conspiracy might be found by the jury without proof of the precise overt acts charged to have been done in pursuance of the conspiracy."

That difficulty does not exist here, for the overt act is a part of the offense, and must be proved, as laid in the indictment. The reason given in the case just quoted from, why the averment of overt acts cannot have effect in the indictment for conspiracy, does not apply.

In my opinion, therefore, this indictment which avers the conspiracy, and then sets out the overt acts done to carry it into effect, is sufficient, and it is not necessary to aver the means agreed on to effect the conspiracy. The averment of acts done to effect the object of the conspiracy, and which must be proven to sustain the indictment, is more than the equivalent of an averment of means agreed on to carry it into effect. This objection to the indictment is not well taken.

It is further objected to the sufficiency of the indictment, that the law upon which it is based is exclusively a revenue law, and intended only for the punishment of conspiracies

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to do certain things prohibited by the act itself. And it is urged that this is not a revenue case, as the overt acts charged are not prohibited by the body of the act, on the thirtieth section of which the indictment is based.

In other words, it is claimed that because the act of March 2, 1867, *supra*, does not in terms forbid the prosecution of fraudulent suits against the United States in the court of claims, and the recovery of judgments and the receipt of money thereon by means of false and fraudulent claims, and perjured testimony, a conspiracy to commence and carry on to a final judgment such a suit, cannot be punished under section 30 of said act above quoted.

This, it seems to me, is too narrow a reading of section 30. It denounces a conspiracy to defraud the United States, not simply by committing one or more of the offenses specified in the act, but to defraud the United States "in any manner whatever," or to commit any offense against the laws of the United States. The language of the section is too broad to be confined within the narrow range sought to be imposed upon it.

It is next said that it is not an indictable offense—to prosecute a suit in the court of claims—that the court to which the claim is submitted must pass upon its genuineness, and if held good, no other court can inquire into or re-examine the question thus passed upon, that the United States is a party defendant to the suit before the court of claims, has the right and opportunity to defend, and cannot, pending the decision of the question therein involved, or subsequent thereto, proceed criminally against the other parties to the cause in another court to punish them for prosecuting a false and fraudulent claim. *Non constat*, but the court of claims may decide the claim just.

The real question is, whether a conspiracy to prosecute a false and fraudulent claim against the United States, and to procure the evidence of false witnesses to support and maintain it, is a conspiracy to defraud the United States. If it is, it falls within the purview of the statute. If a witness gives a false deposition in a civil cause, he may be prosecuted

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therefor criminally, notwithstanding the fact that the court in the civil cause must pass upon the credibility of his testimony. And the fact that, on the strength of his false testimony the civil case has been decided, is no reason why the false witness should not be prosecuted for his crime. The successful issue of the perjury rather furnishes an additional reason for the criminal prosecution.

The position taken in support of the demurrer, amounts to this, that no fraud, no perjury, no subornation of perjury, employed to gain a civil cause can ever be punished, because to prosecute and punish the crime would be equivalent to a collateral re-examination of the cause tried and determined by another court. To state the proposition is to refute it.

It is further insisted that the offense charged is barred by the statute of limitations.

The indictment was found June 6, 1876, and the offense is laid as of March 1, 1874. The section of the law on which the indictment is based has been held to constitute a part of the revenue laws of the United States: *United States v. Rindskopf*, 6 Bissell, 259; *United States v. Fehrenback*, 2 Woods, 175, and by section 1046 Revised Statutes, prosecutions for any crime arising under the revenue laws of the United States must be instituted within five years after the offense is committed. The original section on which the indictment is based, is embodied in a law devoted to the subject of the internal revenue, and it seems clear that a conspiracy to defraud the United States by withdrawing money from its treasury by a false and fraudulent claim, supported by false testimony, is an offense against the revenue laws of the United States. I do not understand that the term "revenue laws" is confined exclusively to laws providing for the collection of the revenues, but may extend to any provision of the laws on the subject of revenue, intended to protect the funds collected under those laws, or which in any other manner have lawfully been paid into the treasury.

As the indictment was filed within five years after the date fixed as the time when the offense was committed, the prosecution is not, in my judgment, barred.

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It is urged as a further objection to the indictment, that there is a fatal variance and repugnancy in the dates set out in the indictment. After a careful reading of the indictment, I am unable to find any impossible or repugnant dates.

Demurrer overruled.

MOORE & JANNEY v. C. M. JONES ET AL.

A person who allows a transfer to be made to him upon the books of a national bank of shares of stock therein, even though such transfer is made solely as security for a debt due the transferee, becomes individually liable for all contracts and engagements of the bank to the extent prescribed by the currency act.

IN EQUITY. Heard on demurrer to the bill. The bill was filed by Robert Moore and Thomas Janney against C. M. Jones and F. F. Case, the latter as receiver of the First National Bank of New Orleans, and alleged in substance that in the year 1866, and before and after that time, the complainants were commercial partners under the name of Moore & Janney; that on December 22, 1866, the defendant C. M. Jones was indebted to complainants, as such partners, in the sum of sixty-five hundred dollars, to secure which he, on the date last named, pledged to complainants sixty-five shares of the capital stock of said national bank, then owned by him, and, to make said pledge effectual, the said Jones delivered to complainants the certificates of stock which had been issued to him by the bank.

The bill further alleged that the complainants never were the owners of said stock, and that they had no right or interest therein except as pledgees in the manner and for the consideration aforesaid; that the said pledge was perfect by the delivery of the certificates of stock, but that, in ignorance of their legal rights, they had said shares of stock transferred to

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them on the books of the bank, under the erroneous belief that such transfer was necessary to the validity of said pledge, and that said transfer was made on the 22d day of December, 1866, before the failure of said bank to redeem its circulating notes, and before the appointment of said receiver.

The bill claimed that the transfer on the books of the bank of the stock was unnecessary to invest the complainants with a privilege on said shares, and that, notwithstanding the transfer, Jones continued to be the actual owner of the shares and was alone liable to the obligations imposed by law upon shareholders in national banks.

It was further alleged that the receiver, the said bank having failed to redeem its circulating notes and having been put in liquidation by the comptroller of the currency, had commenced an action at law against complainants to enforce against them the individual liability provided by the currency act against the holders of shares in national banks. The averment was, that if any ground existed for said action against the shareholders of the bank, the action should be against the said C. M. Jones, who was the real owner of the stock, and not against complainants; that the said defense of complainants could not be made at law, and that the aid of a court of equity was necessary to their complete and adequate protection.

The bill therefore prayed that said receiver might be enjoined from further prosecuting said suit at law against complainants; that said C. M. Jones might be decreed to be the owner of said stock, and that the transfer thereof to the complainants might be declared to have been made in error and be corrected so as to exhibit the said C. M. Jones as the owner thereof; and that it might be decreed that the complainants are not individually liable thereon.

To this bill the defendant F. F. Case, receiver, interposed a demurrer, on the ground that the bill did not make a case for equitable relief.

Messrs. John Finney and Henry C. Miller, for complainant.

Mr. John D. Rouse, for the receiver.

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Woods, Circuit Judge. The demurrer is well taken. The currency act, Revised Statutes, section 5139, declares that "the capital stock of each association shall be divided into shares of one hundred dollars each and be deemed personal property, and shall be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of said shares."

Now, according to the averments of the bill, Moore & Janney became the transferees of the stock of Jones by transfer on the books of the association. According to the terms of the act such transfer made them stockholders and subjected them to all the rights and liabilities of the prior holder of the shares, among which is that shareholders shall be held individually responsible equally and ratably, and not one for another, for all contracts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares.

So far as the bank and the public were concerned, Moore & Janney were the owners of the stock. They were entitled to vote the stock at stockholders' meetings, to draw dividends, and to transfer the stock to whom they pleased. The public were advised by the list of stockholders kept in the office where the business of the bank was transacted (see Rev. Stat., sec. 5210), that Moore & Janney were shareholders to the amount of sixty-five shares. By appearing on the stock book of the bank and upon the list of shareholders required to be posted in the business room of the bank, they assumed the liability of shareholders. Neither the bank nor the public were required to take notice of the private understanding between Moore & Janney and the person from whose name the stock had been transferred. The individual liability falls upon the person who appears on the stock book of the bank by transfer to him to be the owner of the stock. The law organizing the banks seems to place it there. To allow one who, by inspection of the stock book, appears to be a share-

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holder who has allowed himself to be held out by the bank to the public as a shareholder, to set up secret arrangements between himself and the real owner as a defense to his individual liability for the debts of the bank, would be to make of no avail the individual liability clause of the currency act.

“It is well settled that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the register of the corporation as the owner of the stock is, in the event of the insolvency of the corporation, chargeable as a stockholder for the benefit of creditors:” Thompson on Stockholders, sec. 223; *Adderly v. Storm*, 6 Hill, 624; *Rosevelt v. Brown*, 11 N. Y., 148; *Matter of Empire City Bank*, 18 N. Y., 199, 223; *Holyoke Bank v. Burnham*, 11 Cush., 183; *Magruder v. Colston*, 44 Md., 349; *Crease v. Babcock*, 10 Metc., 525, 545; *Wheelock v. Kost*, 77 Ill., 296; *Pullman v. Upton*, 96 U. S., 328.

Moore & Janney, so far as the bank and the public were concerned, were to all intents and purposes shareholders and individually liable as such. The demurrer to the bill must be sustained.

EDWARD J. GAY v. G. LYONS, SHERIFF, ET AL.

1. A plaintiff who has a suit in a state court in which there is a controversy between him and a citizen of the same state touching the title to a tract of land, cannot remove the case to the federal court merely because he claims title under a sale made by the United States marshal upon a *fiery facias* issued from the federal court.
2. Such a case cannot be removed unless the validity or effect of the judgment, or the proceedings and sale under which the plaintiff claims title is brought in question.

This cause came on to be heard upon the motion of the defendants to remand the case to the district court for the fifteenth judicial district, where the action had been originally brought, and from which the plaintiff had removed it.

The petition filed in the state court represented that Edward J. Gay, the plaintiff, on June 5, 1875, became the purchaser at a sale made by the United States marshal, by virtue of an execution issued from this court on a judgment rendered therein, in the case of *John Brown v. John Nelson*, of a cer-

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tain Acadia plantation, situated in the parishes of Lafourche and Terbonne, that the marshal made and delivered to him a deed for the lands so purchased, which was duly recorded in the proper offices in said parishes; that in executing said judgment and completing the proceedings, the marshal in accordance with the requirements of article 708 of the Louisiana Code of Practice, directed and required the recorders of said two parishes to release all mortgages standing recorded in said parishes against said Acadia plantation, and the recorder of the parish of Terbonne having refused to erase said mortgages, the said plaintiff Edward J. Gay, Edward J. Gay, Jr., and Samuel Cranwell, composing the firm of E. J. Gay & Co., had filed in this court a bill against all parties in whose name any mortgage or privilege stood recorded in said parish of Terbonne, and particularly against Flavillus S. Good and H. M. Johnson, the recorder of said parish, in which bill they averred that they were the owners of said property, and prayed that the said defendants thereto might be compelled to erase and cancel all said mortgages, and that it might be decreed and determined that the mortgage and vendor's lien recognized in said judgment of *James Brown v. John Nelson* were the superior lien on said property, and the price at which said property was sold not being sufficient to meet the whole of the vendors' privilege and mortgage, to have it decreed that all other mortgages should be erased. The petition averred that said case was still pending in the state court.

The petition in the case under consideration, further alleged that the plaintiff, Edward J. Gay, immediately after said adjudication by the marshal on June 5, 1875, as aforesaid, went into possession of the property sold to him and remained in quiet possession thereof until the sheriff of the parish of Terbonne, to wit, the defendant, G. Lyons, disturbed his possession by seizing certain portions of said plantation which were particularly described; that said seizure was made by virtue of a writ of *feri facias* issued from the district court of the fifteenth judicial district of the state of Louisiana in the suit of *F. S. Good v. John Nelson* and others. The petition claimed and averred that said seizure and all the proceedings of the sheriff and said Good under said judg-

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ment were illegal and an infringement on the rights of plaintiff, (1) because the property having been sold and conveyed to the plaintiff as aforesaid, and his deed having been recorded before Good issued his *fiery facias*, and plaintiff being in possession under his purchase and deed, his deed and conveyance could not be treated as a nullity, and until said sale was set aside no seizure could be made, and (2) that if any nullity existed the same was relative only and depended on the questions and issues raised in said bill filed by the said members of the firm of E. J. Gay & Co., and that all proceedings of said Good against said property should be suspended until said issues are determined by the court.

The petition further alleged that the claim of James Brown on which said property was seized and sold, was the paramount claim against said property, and had preference over the claim set up by Good. That the claim of James Brown on which the property was sold was a partnership debt of the firm of Nelson & Donelson, and said property was sold as partnership property of said firm, and that the claim of Good was an individual claim against some of the heirs of one of the members of said firm, that Nelson & Donelson were partners in planting in the state of Louisiana, that they purchased as such partners the said Acadia plantation, and the notes on which the suit of *James Brown v. John Nelson* and others was based represented the vendors' privilege, and were superior to all claims and pretensions of said Good, that Good and those under whom he claimed had notice of the existence of the outstanding claim for a part of the purchase price of said Acadia plantation.

The petition then proceeded to allege various grounds on which it was claimed that the writ of *fiery facias* issued at the instance of Good was without warrant of law, and could not be executed.

The petition prayed for the writ of injunction enjoining and prohibiting the said Lyons as sheriff, and the said Good from selling the said property until the further order of the court.

The injunction as prayed for in the petition was allowed by the state court and served. Afterwards, and before any answer of the defendant had been filed, the plaintiff filed his

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petition for the removal of the cause to this court and tendered his bond as required by law. The state court refused the application for removal. Nevertheless, the plaintiff, having obtained a transcript of the record, filed it in this court. Thereupon, the defendant moved to remand the cause to the state court, and upon this motion the case was heard.

Messrs. John Finney, II. C. Miller and Lyman Harding, for the motion to remand.

Messrs. J. R. Beckwith and Barrow & Pope, contra.

WOODS, Circuit Judge. The ground upon which the motion to remand is based is that this is not a case of which the court has jurisdiction, all the parties being citizens of the state of Louisiana. To this the plaintiff, conceding the fact that the controversy is not between citizens of different states, replies that it is a case "arising under the constitution and laws of the United States," and is therefore removable to this court under section 2 of the act of March 3, 1875: 18 Stat., 470. The plaintiff's claim is that his rights rest on judgments of the United States circuit courts. He avers that "the validity of the judgments depends on the laws of the United States creating the circuit courts; so far as the claim of plaintiff rests on sales, the validity of the sale depends on the laws regulating the proceedings in execution of the judgment, and these are federal and not state laws. Without the laws of the United States creating the circuit court, fixing its jurisdiction, providing for issuing execution, the officers to execute the same, and prescribing the manner and effect of said execution, the plaintiff's rights would never have arisen at all."

To give full effect to this line of argument, it would follow that whenever a person buys real or personal estate at a sale made by a United States marshal by virtue of a judgment of a United States court, that court has ever after jurisdiction over all controversies arising in relation to the title of the property sold, without respect to the citizenship of the parties to the suit. If the marshal sells a tract of land to A, and B sets up title to it, claiming under an older and better title than that derived from the marshal's sale, the argument is that the case presented is one arising under the laws of the United

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States. Such a position is not tenable. Now, in the case under consideration, the plaintiff sets up title by virtue of the marshal's sale to himself of the premises in controversy. It does not appear that the validity of this sale, or of the proceedings of the marshal antecedent to the sale, or of the judgment under which the sale was made, is at all questioned. What the answer of the defendant may be it is impossible to know until it is filed. So far as we can gather from the petition, the claim of Good may rest on the fact that he has an older and better lien on the premises, or that he had no notice of the vendor's lien under which the plaintiff claims priority. The dispute seems to be between citizens of Louisiana concerning the rank and priority of mortgages; matters settled by the law of Louisiana, and to be construed and take effect according to that law. At all events it does not appear that the validity of the judgment or proceedings and sale under which the plaintiff claims is at all called in question. Clearly until such question is raised, the case, when it is between citizens of the same state, cannot be removed to the federal court on the ground that it is one arising under the constitution and laws of the United States.

In the case of *Dupassey v. Rochereau*, 21 Wall., 130, the court said, "that when a state court refuses to give effect to the judgment of a court of the United States, rendered upon the point in dispute, and with jurisdiction of the case and parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for review. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the circuit court and giving it jurisdiction, and hence it would be within the judicial power of the United States as defined by the constitution."

But it is plain from this language that, if the state court did not refuse to give effect to the judgment of the federal court, the United States Supreme Court would not entertain jurisdiction. And so, unless the effect of the judgment and proceedings of a federal court are brought into controversy in a suit in a state court, there is no ground for removal.

The John T. Moore.

It has been expressly held by the Supreme Court of the United States, in *McStay v. Friedman*, 92 U. S., 723, that it had no jurisdiction of a case brought up on writ of error to the Supreme Court of California, where, in ejectment for a part of the lands confirmed to the city of San Francisco by an act of congress, the validity and operative effect of which were not questioned, the judgment of the state Supreme Court was adverse to the defendant, who endeavored to make out such possession as would, under the operation of the city ordinance and the act of the legislature, transfer, as he claimed, the title of the city to him.

See also *Romie v. Cassanova*, 91 U. S., 379. In the case of *Trafton v. Nougues*, 4 Sawyer, 178, Sawyer, circuit judge, held that only suits involving rights dependent on a disputed construction of the constitution and laws of the United States could be transferred from the state to the federal courts under the clause "arising under the constitution and laws of the United States," of section 2 of the act of March 3, 1875, to determine the jurisdiction of the United States courts, etc.

I am of opinion, therefore, as it does not appear from the record that there are any rights in this case dependent on a disputed construction of either the constitution or laws of the United States, nor that the effect of the judgment of a federal court is called in question in the state court, that this court has not jurisdiction of the case, and the motion to remand it should prevail. Ordered accordingly.

THE JOHN T. MOORE.

1. Under the local law of Louisiana, claims for materials and supplies furnished a vessel in her home port are a lien on the vessel, if recorded in the proper parish. Without such registry they have no privilege or priority over subsequent mortgages recorded by authority of the act of congress, or claims of later date recorded by authority of the state law.
2. Claims for materials and supplies furnished in the home port, even if duly recorded, are postponed to maritime liens.
3. The registry of a mortgage on a vessel, to be effectual, must be made in the custom-house of her home port.

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4. Where the mortgagee of a mortgage on a vessel, which was recorded in the proper custom-house, had notice of a prior unrecorded mortgage, his mortgage was postponed to the unrecorded mortgage.
5. Where A had an unrecorded mortgage on a vessel, and B had a mortgage on the same vessel of later date, duly recorded under the act of congress, but had actual notice of the mortgage of A, and C had a lien by virtue of the registry of his claim under the state law, subsequent in date to the mortgages of both A and B, but C had no notice of the mortgage of A, and the claim of either A or B was sufficient to absorb all the proceeds of the sale of the vessel: *Held*, that said proceeds should be first applied to the mortgage of A.
6. The fact that a mortgage on a vessel has not been acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds, precludes its registry, but does not render it void as against the mortgagor, nor postpone it to the recorded mortgage of a subsequent mortgagee who had notice of such unrecorded mortgage.
7. The wages of a watchman employed on a vessel while lying-up in port are not a maritime lien.
8. There is no maritime lien for the premium due on a policy of insurance taken on a vessel by her owners.

THE judge of the United States district court, in which this cause was pending, having been of counsel for one of the parties, the cause was transferred to this court by virtue of the provisions of section 601 Revised Statutes.

The steamboat John T. Moore, whose home port was New Orleans, was libeled in the United States district court for the district of Louisiana, by A. M. Simonds and others, was seized and sold, and the proceeds of sale, amounting to \$24,000, paid into the registry of the court.

The case was referred to J. Ward Gurley, as master, to report a tableau of distribution of the proceeds of the sale of the boat. He made a report by which he allowed as mariner's wages the sum of \$3,150.97, and as costs \$2,190.15, leaving a balance of \$18,658.88.

The master then reported that there was due to various persons who had furnished supplies, materials, and repairs to the steamer in her home port, New Orleans, the sum of \$32,251.45, which was more than sufficient to absorb the residue remaining in the registry of the court after the payment of the mariners' wages and costs.

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He reported these claims as a first lien next after the costs and mariners' wages upon the fund remaining in the registry.

Swift's Iron & Steel Works, of Cincinnati, Ohio, and Dennis Long, of Louisville, Kentucky, claimed the said residue of the proceeds of the sale, by virtue of a mortgage executed to them jointly upon the steamer, dated January 27, 1871, and recorded in the custom house at Cincinnati on February 8, 1871, whereby the sum of \$21,902.98 was secured to Swift's Iron & Steel Works, and the sum of \$9,206.52 was secured to Dennis Long. These debts were contracted for work done and materials supplied in the construction of the boat.

The commercial firm of John T. Moore & Co., of New Orleans, claimed to be first paid out of the fund remaining in the registry of the court next after the payment of seamen's wages and costs, by virtue of a mortgage upon the boat, executed to secure to them the sum of \$14,669.22, dated January 3, 1872, and recorded in the United States custom house at New Orleans on January 4, 1872.

The commercial firm of W. G. Coyle & Co., of New Orleans, claimed to be paid out of said proceeds so remaining in the registry, by virtue of a claim for \$4,032.73 for supplies furnished said boat in her home port, and recorded in the office of the recorder of mortgages for the parish of Orleans on January 9, 1874.

Exceptions were taken to the report of the master by the several claimants of the fund, and upon these exceptions the cause was heard.

Mr. M. M. Cohen, appeared for the mariners whose wages had been rejected by the master.

Mr. B. Egan, for the furnishers of materials, supplies, and repairs.

Mr. R. De Gray, for Swift's Iron & Steel Works and Dennis Long.

Mr. C. B. Singleton, for John T. Moore & Co.

Mr. James McConnell, for W. G. Coyle & Co.

Woods, Circuit Judge. It is conceded that the \$24,000, the proceeds of the sale of the John T. Moore, is first subject

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to the payment of the costs and seamen's wages, amounting as reported by the master to the sum of \$5,341.12. The residue, \$18,658.88, is insufficient to pay all the claims preferred against it. It therefore becomes necessary to decide what claims are entitled to precedence.

The first contest is between the claims for supplies, materials, and repairs furnished the boat in her home port, and the mortgages (above mentioned) to Swift's Iron & Steel Works and Dennis Long, and to John T. Moore & Co., and the recorded claims of W. G. Coyle & Co.

The claims for materials and supplies furnished, and repairs done in the home port, cannot take precedence over the mortgage of John T. Moore & Co., and the recorded claims of Wm. G. Coyle & Co., for the supplies, etc., were furnished in the home port of the boat, and the claims therefor were not recorded under the state law so as to acquire a lien as against third persons.

By article 3237, Revised Civil Code, debts due to creditors for supplies, labor, repairing, victuals, armament, and equipment are privileged on the price of ships and other vessels. But by article 3274 no privilege shall have effect against third persons unless recorded in the manner required by law in the parish where the property to be affected is situated.

The claims under consideration were never recorded, and, therefore, can have no effect as privileged claims over those creditors who have liens either by the maritime law, or who have liens by the fact that their claims have been recorded under either the laws of the United States or the state of Louisiana: *The Lottawanna*, 21 Wall., 558.

In fact, it seems to be held in the case of the *Lottawanna* that such claims have no lien at all unless recorded. Even if recorded they must be postponed to the maritime lien.

The mortgage claim of John T. Moore & Co., which was duly recorded according to law in the office of the collector of customs at New Orleans, will, with interest, be sufficient to absorb the entire fund remaining in the registry for distribution. As John T. Moore & Co. are entitled to priority over the claims for materials, supplies and labor furnished in the

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home port, and not recorded as required by the state law, these claims, represented by Simonds, original libellant, and certain intervenors, may be considered as out of the case. As the mortgage to John T. Moore & Co. was recorded long before the claim of W. G. Coyle & Co. was filed for record in the mortgage office of the parish of Orleans, the latter claim may also be considered as out of the case.

The next contention is between the mortgage claims of Swift's Iron & Steel Works and Dennis Long on the one hand, and the mortgage of John T. Moore & Co. on the other.

As already seen, the mortgage to Swift's Iron & Steel Works and to Long was recorded in the office of the United States collector of customs at Cincinnati, on February 28, 1871. The mortgage to John T. Moore & Co. was recorded in the office of the United States collector of customs in New Orleans, the home port of the vessel, on January 4, 1872. So far as priority of record is concerned the mortgage to Swift's Iron & Steel Works and Long has the advantage.

But in reply to this it is claimed by John T. Moore & Co. that as their mortgage was recorded in the custom house at the home port of the boat, and the other was not, their mortgage is the better one. This position is sustained by the act of congress, which declares that "no bill of sale, mortgage, hypothecation, or conveyance of any vessel or any part of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of customs where such vessel is registered or enrolled." U. S. Revised Statutes, sec. 4192.

And in the case of *White's Bank v. Smith*, 7 Wall., 646, the Supreme Court in construing this law declared that "the home port of the vessel is the port in the office of whose collector the bill of sale, mortgage, etc., should be recorded."

So that it seems that the recording of the mortgage to Swift's Iron & Steel Works and Long, in the office of the collector of customs at Cincinnati, which was not the home

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port of the boat, was ineffectual as a record, and, so far as the record of these contending mortgages is concerned, that of John T. Moore & Co., which was recorded in the proper office, has the advantage.

But Swift's Iron & Steel Works and Dennis Long reply to this that conceding that the mortgage to John T. Moore & Co. has the advantage in registry, yet their mortgage is valid even if it had never been recorded as against the mortgagor and against persons having actual notice thereof, and that John T. Moore & Co. had actual notice of the mortgage to Swift's Iron & Steel Works and to Long before the execution or registry of the mortgage to them.

An examination of the record upon the question of notice satisfies me that the decided preponderance of proof is in favor of the proposition that John T. Moore & Co. had notice of the mortgage to Swift's Iron & Steel Works and Long, before they took their mortgage from the owners of the John T. Moore.

Under the terms of statute, and by the decisions of the courts, actual notice is equivalent to notice by registry: *Patterson v. De La Ronde*, 8 Wall., 292; *Mills v. Smith*, *Ib.*, 27; *Cordova v. Hood*, 17 *Ib.*, 1; *King v. The Young Men's Association*, 1 Woods, 386; *Planters' Bank of Georgia v. Allard*, 8 Mart. New Series, 136; *Bell v. Haw*, *Ib.*, 243; *Rachal v. Normand*, 6 Rob., 88; *Swan v. Moore*, 14 La. An., 833; *Smith v. Lambeth*, 15 *Ib.*, 566.

As, therefore, John T. Moore & Co. had actual notice, before the execution of the mortgage to them, of the existence of the mortgage to Swift's Iron & Steel Works and to Long, their mortgage must be postponed to the latter one.

But counsel for John T. Moore & Co. claim that the mortgage to Swift's Iron & Steel Works and Long was not acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds, and that the law (Rev. Stat., sec. 4193) having declared that "no bill of sale, mortgage, hypothecation, etc., of any boat shall be recorded" unless so acknowledged, the said mortgage is ineffectual to

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postpone the claim of John T. Moore & Co., even though they had notice of the same.

I do not think this position can be defended. The law prescribes no formalities for the execution of a mortgage on a vessel so as to bind the mortgagor, or to postpone those having actual notice. This mortgage was for a debt contracted by her owners in the building of the vessel. The debt secured by it is confessedly just, the mortgage to secure it was executed by the owners of the boat in the presence of witnesses, and the contesting creditors, John T. Moore & Co., had notice of it. In my judgment it is binding on the mortgagors and those having notice of it without any registry. The acknowledgment before a notary is only necessary to secure registry. If the mortgagee is content to stand upon his mortgage without registry he can do so, and his mortgage is good against the mortgagor and all having actual notice. Until it is declared by law that a mortgage not acknowledged before a notary or other officer shall be void, a mortgage without such acknowledgment must be held good against the mortgagor and those having notice.

By all the authorities, so far as the binding effect of the mortgage is concerned, subsequent incumbrancers with notice are placed on the same footing as the mortgagors themselves.

In my judgment, therefore, the mortgage to Swift's Iron & Steel Works and Dennis Long is entitled to precedence over the mortgage to John T. Moore & Co.

This disposes of the main controversy in the case. The point decided is this: John T. Moore & Co. have a mortgage on the vessel sufficient in amount to absorb the fund remaining in the registry of the court. This mortgage has precedence over the unrecorded claims for materials and supplies furnished in the home port, and over the recorded claims for materials and supplies of Wm. G. Coyle & Co. If there were no other claims in the case, John T. Moore & Co. would be entitled to the entire fund remaining in the registry of the court. But Swift's Iron & Steel Works and Dennis Long have a mortgage ineffectually recorded, and, therefore, in effect, not recorded at all, which is older than

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the mortgage of John T. Moore & Co., and of which John T. Moore & Co. had notice before the date of their own mortgage.

This fact of notice gives the mortgage to Swift's Iron & Steel Works and Long precedence over the mortgage of John T. Moore & Co., and entitles it to priority of payment over all the claims, even though, as between the mortgage to Swift's Iron & Steel Works and Long, and claims inferior to the mortgage of John T. Moore & Co., the latter would be entitled to priority if the mortgage of John T. Moore & Co. were out of the case: *Brazee v. The Lancaster Bank*, 14 Ohio, 318; *Holliday v. Franklin Bank of Columbus*, 16 Ohio, 533.

Exception has been taken to the disallowance, by the master, of the claims of certain watchmen. The wages of these watchmen were earned, as appears from the report of the master, while the vessel was lying up. These wages do not, therefore, constitute an admiralty lien, and the master was right in rejecting their claims as liens upon the vessel: *Phillips v. The Scattergood*, 1 Gilpin, 1.

Exception is also taken to the report of the master because he rejected claims of certain insurance companies for premiums on certain policies of insurance taken on the John T. Moore by her owners. I know of no law which gives a lien upon a vessel for the premium for an insurance taken on her by her owners for their own benefit. It is a contract with the owner for his own benefit. It does not aid the vessel. In case of loss the maritime liens upon the vessel are displaced and do not follow the insurance money. The money goes to the owner for his own benefit, and not to the lienholder who may insure his own interest: *Thayer v. Goodale*, 4 La., 221; *Steele v. Franklin Fire Ins. Co.*, 17 Penn. St., 290; *Turner v. Stetts*, 28 Ala., 420; *White v. Brown*, 2 Cush., 412; *Stillwell v. Staples*, 19 N. Y., 401; *Slark v. Broom*, 7 La. An., 337. The master was right, therefore, in deciding that the claims of the insurance company for premiums were no lien upon the vessel.

Let a decree be entered in accordance with the views above expressed.

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GEORGE B. JOHNSON v. ALLEN JUMEL.

1. The jurisdiction of the United States Circuit Courts under section 2010 Revised Statutes, is limited to those actions in which the sole question touching the title to office arises out of the denial to citizens of the right to vote on account of their race, color or previous condition of servitude.
2. That section gives no jurisdiction over a case brought to enable a party physically to regain an office to which he had a title established by the election, into which he had been inducted, but from which he had subsequently been ejected.

HEARD ON DEMURRER TO THE PETITION.

This action was brought by George B. Johnson to recover possession of the office of auditor of public accounts of the state of Louisiana.

The plaintiff alleged that on November 7, 1876, he was a candidate for said office, at which time an election was held therefor, according to the constitution and laws of the state of Louisiana, and that at said election he was duly elected to said office; that on the 6th day of December, 1876, he was in due course and process of law returned elected by the returning officers of election of said state, in manner and form as provided by law; that in December, 1876, he was, in consequence of his said election and return, and according to law, duly commissioned by Wm. P. Kellogg, governor of the state of Louisiana; that he then took the oath of office, gave bond as required by law, and entered upon the full and undisputed discharge of the duties of said office of auditor of public accounts for the state of Louisiana, and continued in the actual undisturbed and undisputed possession thereof, with the full and free exercise of all the duties, powers and prerogatives of said office up to the 25th day of April, 1877; that on or about the 25th day of April, 1877, he was forcibly and fraudulently deprived of his election to said office by the defendant, claiming to be auditor of public accounts of said state, and Francis T. Nicholls, acting governor of said state, in the manner following, to wit: That the said Francis T. Nicholls, claiming to represent the state of Louisiana as governor, and

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Allen Jumel, claiming to be auditor of public accounts of said state, wrongfully, unlawfully, by violence and force of arms, and against the will and consent of the petitioner, took forcible possession of said office, and that said Jumel had ever since been in control and possession thereof; that the claim of authority set up by the said Francis T. Nicholls and Allen Jumel so to act in their said capacities rested upon a pretended count of the vote cast at said election, which count excluded the votes of nearly ten thousand citizens, legal voters, who offered, but were denied, the right to vote at said election, on account of race, color or previous condition of servitude, who, if they had not been so denied the right to vote at said election, would have voted for the petitioner and against said Jumel, which denial was in violation of the rights secured by the amendments to the constitution, etc.

Petitioner then alleged that he had been deprived of his election to said office by reason of the denial of the right to vote at said election to a large number of qualified electors, who offered to vote thereat, on account of race, color or previous condition of servitude, to the number of at least ten thousand; that according to the laws of Louisiana under which the returns of said election were made a power is vested in returning officers of election to determine, whether citizens, legally qualified voters, had been excluded from the right to vote on account of race, color or previous condition of servitude; that the returning officers of election did exercise that power so vested in them by the laws of Louisiana; that in the exercise of that power they returned petitioner duly elected auditor of public accounts of the state of Louisiana, on account of the denial of citizens who offered to vote at said election of the right to vote on account of race, color or previous condition of servitude; that the said Francis T. Nicholls, acting as governor, and Allen Jumel, pretending to act as auditor, were attempting forcibly and unlawfully, for the reasons aforesaid, to deprive petitioner of his election as aforesaid.

The petitioner then set out in detail the number of voters whom he alleged were denied the right to vote at said elec-

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tion on account of race, color or previous condition of servitude.

The petitioner then averred that the means by which said denial was accomplished were intimidation and a wide-spread feeling of uncertainty and terror throughout the parishes on the part of citizens so denied the right to vote; that by the laws and constitution of said state the pretended vote purporting to have been cast under the aforesaid conditions in the parishes so affected was null and void on the ground thereof; that the returning officers of said election were by law commanded to reject and refuse to count the same, because of said nullity; that by the returns of said election, made in obedience to said law, the petitioner was duly elected auditor, and that the claim of said Jumel to have been elected auditor was founded on the wrongful and unlawful count of the votes so made null and void, whereby the said Jumel received in the count of the votes the full benefit of the votes cast in the parishes in which there was this denial of the right to vote to 10,000 citizens aforesaid; that the lawfully elected state government, of which petitioner was one of the officers, had been overthrown by violence, domestic insurrection and revolution as above set forth; that the government thus set up and established was the government of which Francis T. Nicholls was head; that the state of Louisiana, as represented by its said pretended government, through its pretended officers thus installed, had deprived the petitioner of his election, but that said revolution had in no wise altered or impaired the right of the petitioner as auditor.

Then followed the averment as to the salary and legal perquisites of the office of auditor.

The petition concluded with the prayer for citation, and for judgment decreeing that the petitioner was the legal auditor for the full term of four years, and for an injunction restraining the defendant from interfering in any manner with the exercise on the part of the petitioner of the duties of said office; that the said Jumel be ordered to deliver over to petitioner the

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keys, books, etc., of said office, and for damages in the sum of \$5,000.

Messrs. John Ray and H. J. Campbell, for petitioner.

Mr. J. C. Egan, assistant attorney-general of Louisiana, for defendant.

BILLINGS, District Judge. The substance of the petition is, that the petitioner was a candidate for the office of auditor of public accounts of the state of Louisiana at the election held on the 7th of November, 1876; that voters in various parishes who were entitled to vote were denied the right to vote at said election on account of race, color or previous condition of servitude, to the number of 10,000; that the officers known as the returning board were by law vested with complete jurisdiction to correct the errors and wrongs which had then arisen in these various parishes, and that they did make such corrections and returned the petitioner elected to said office; that he was duly commissioned and entered upon and enjoyed the possession of said office for the period of four months, when he was forcibly ejected by a government established by domestic violence, insurrection and revolution; that the claim or pretense upon which they have ousted him from his office is that the petitioner was not elected, and that the votes which were cast in the parishes in which the right to vote was denied should be counted against him. According to the allegations of this petition, petitioner has not been defeated or deprived of any election; but, on the contrary, was elected and was declared elected by the competent state authority, was duly commissioned, and retained his office for the period of four months. True, there had been an unsuccessful attempt to defeat petitioner by an exclusion of votes in the various parishes, but he avers that that attempt had been completely thwarted by the tribunal which had the final revision of the returns. Every vote that was cast, or was attempted to be cast, for the petitioner and against the defendant had, according to his allegations, full effect given to it, and was finally and effectively counted by the board of returning officers. He has thus, so

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far from having been defeated, succeeded in an election, and instead of having been deprived of an election, has secured an election, and four months after the election has been deprived, not of an election, but of an office, to which he had been elected and authoritatively declared elected; and he has been deprived of an office, not by the exclusion of votes for any reason, but by force, which took the proportions of a revolution. The statute under which jurisdiction is given to the circuit court is set forth in the act of May 31, 1870, sec. 23, 16 Stat., 146; Rev. Stat., sec. 2010, as follows: "That whenever any person shall be defeated or deprived of his election to any office, except elector of president or vice-president, representative or delegate in congress, or member of a state legislature, by reason of the denial to any citizen or citizens, who shall offer to vote, of the right to vote, on account of race, color or previous condition of servitude, his right to hold and enjoy such office and the emoluments thereof shall not be impaired by such denial, and such person may bring any appropriate suit or proceeding to recover possession of such office, and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote on account of race, color or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides."

From this it appears that the cases in which the circuit courts have jurisdiction of such actions as this are limited to those in which it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote, to citizens who so offered to vote, on account of race, color or previous condition of servitude, and that the jurisdiction of the circuit court is only given to the extent of determining the rights of the parties to such office, by reason of the denial of the right guaranteed by the fifteenth article of amendment to the constitution of the United States.

There is no doubt that the scope of this statute, under the limitations which it contains, extends from the first act

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required to be done in the matter of an election down to and including the final and effective canvass of the votes by the officers who are charged with the duty of determining and certifying the result. If, in any of the stages of an election, in registration, in the receipt of votes, the certificates of the votes by the local authorities, or the final canvass of the votes or the certificate of election by the returning board, there had been such a denial of the right to vote as the statute contemplates, on account of race, color or previous condition of servitude, that matter this court would have had, under the act of congress, jurisdiction to inquire into and adjudicate upon, and it could determine the rights of the parties to office, so far as they depended upon the denial of the right guaranteed by the fifteenth article of the amendment to the constitution. But the jurisdiction of the court begins and ends with the denial of the right to vote.

If, therefore, there is a preliminary exclusion or an exclusion at the polls, and that error is corrected by the proper state authorities and there is no final and effective exclusion of votes or discrimination, or if after an election has been held and the result reached and declared without discrimination or exclusion from any cause, the person elected is deprived of his office, then the statute closes the doorway upon the jurisdiction of this court. The defeat of a candidate at an election or his deprivation of an election, must be accomplished by the machinery of the election, in one of its stages, and must be contained in the result. If the election terminates in the success of the candidate, the essential ground of jurisdiction on the part of this court is wanting. The wrong which the petitioner sets forth is, that after being elected and installed, he has not been retained in the office. The object of the statute was to secure an election free from all possible exclusion on any of the specific grounds. It secured this object by giving to this court jurisdiction to correct, through this form of action, such exclusion effected by the machinery or practices attending the election. When, as the petitioner alleges, all this has been accomplished, and the very result aimed at by the statute has been worked out and

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declared, the statute gives no jurisdiction over a cause merely to enable a party to physically retain or regain an office to which he had a title established by an election, and from which he has subsequently been ejected. In this case the question by virtue of which the court could take jurisdiction, and by the terms of the statute it must be unmixed with any other question, is not presented. According to the allegations of the petition, the election had been completed for four months when the ouster took place, and his loss of office is as independent of any denial of the right to vote as if he had been ejected by a government set up by a foreign invasion, claiming authority by the right of conquest.

Let the demurrer be sustained and the petition dismissed.

J. II. PORTER ET AL. V. THE SCHOONER SEA WITCH.

1. Pilotage and towage into port stand in the same rank of maritime liens with necessary supplies and repairs.
2. But a claim for towage furnished in one voyage has a lien superior to a claim for supplies furnished on a previous voyage.

ADMIRALTY APPEAL. The Sea Witch was a foreign vessel which sailed from Belize, Honduras, on a coasting voyage, about September 16, 1876. She left Ruatan on Nov. 1, 1876, and reached the port of New Orleans, where she was seized and sold under process in this case.

The claim of the libellant Porter was for a sail furnished the Sea Witch at Pensacola, Florida, on June 24, 1876.

E. C. Lyle, an intervener, claimed for supplies furnished at Mobile, on December 1, 1875.

The Ocean Tow Boat Company intervened upon a claim for towage due for towing the Sea Witch from the mouth of the Mississippi river to New Orleans upon her last voyage at the close of which she was seized in this case.

The proceeds of the sale of the vessel were not sufficient to pay all the maritime liens, and a question arose between the

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Ocean Tow Boat Company and the other two creditors above mentioned, whether the claims of the former were entitled to priority of payment.

Messrs. C. B. Singleton and R. H. Browne, for libelants.

Messrs. Jos. P. Hornor, W. S. Benedict and E. D. Craig, for interveners.

WOODS, Circuit Judge. There can be no serious question that pilotage and towage into port, etc., stand in the same rank with necessary supplies and repairs when furnished for the same voyage: *The Emily Souder*, 17 Wall., 666.

But the contention here is, that as the towage was furnished on the last voyage of the schooner, and the claims of Porter and Lyle were for supplies furnished on previous voyages, the claim for towage is entitled to priority of payment.

This claim seems to be sustained by the adjudged cases.

In *The Paragon*, 1 Ware, 326, Judge Ware remarks: "The priority of the privilege for seaman's wages stands upon a principle affecting all privileged debts, that is, that among these creditors he shall be preferred who has contributed most immediately to the preservation of the thing (2 Valin's Com., 12 Liv., 3, tit. 5, art. 10). It is upon this principle that the last bottomry bond is preferred to those of older date, and that repairs and supplies furnished a vessel on her last voyage take precedence of those furnished in a prior voyage, and that the wages of the crew are preferred to all other claims, because it is by their labors that the common pledge of all these debts has been preserved and brought to a place of safety."

The same principle is recognized in *Surplus of the Ship Trimountain*, 5 Benedict, 246.

In the case of *The Hope*, reported in Aspinall's Maritime Law Cases, vol. 1, 563, it was held that maritime liens are entitled to rank against the fund in the inverse order of their attachment upon the *res*, or that the later in time is the earlier in payment. In that case, it was also decided that the master's wages, which, by the merchants' shipping act of 1854, had been placed on the same footing as seamen's wages,

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were inferior in rank to a bottomry bond given upon the vessel on a voyage subsequent to that on which the wages were earned.

These and other authorities which might be cited show that wages earned and supplies furnished for the latter voyage take rank as to priority of payment over wages and supplies earned or furnished for a former voyage. Whether this rule should apply to the short and frequent trips of river steamers, it is not necessary now to decide. As the pilotage was earned on the last voyage of the Sea Witch, and the supplies of libellant and intervener were furnished for former voyages, I am of opinion that the Ocean Tow Boat Company should be paid first out of the proceeds of the sale; that the residue of the fund, if any, should be applied first to the payment of the claim of Porter, and then to the payment of the claim of Lyle.

Decree accordingly.

MYRA CLARK GAINES v. M. J. LIZARDI ET AL.—SEVEN
OTHER CASES IN WHICH MYRA CLARK GAINES IS COM-
PLAINANT AND DIVERS PARTIES DEFENDANTS.—JOSEPH
FUENTES ET AL. v. MYRA CLARK GAINES.

1. Article 3540 of the Civil Code of Louisiana, which declares that actions for the nullity of testaments are prescribed in five years, refers to actions brought against parties who are in possession under a will, and has no application to a suit in which a will is relied on as a muniment of title by a party out of possession.
2. Articles 942 and 943, Louisiana Code of Practice, prescribing what the *proces verbal* required to be made at the opening and proving of a will shall contain, do not, with the exception of that provision which relates to the order for executing and recording a will, apply to wills which are lost.
3. Where the proof showed that an olographic will was written, dated and signed by the testator, and bore date of some day in a designated month, but did not show of what particular day, this established sufficiently a compliance with the requirement of the Civil Code, that an olographic will shall be entirely written, dated and signed by the testator.

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4. A discussion of the evidence to establish the fact that Daniel Clark duly executed a will in the year 1813, whereby he instituted his daughter, Myra Clark, as his universal legatee.
5. Discussion of the evidence to rebut the presumption that Daniel Clark destroyed said will, arising from the fact that it could not be found after his death.
6. Parties who claimed title to property of the estate of Daniel Clark, derived under his will executed in 1811, could not, in a suit brought by the universal legatee under his will executed in 1813, be considered as possessors in good faith and entitled to plead the prescription of ten years.

IN EQUITY. Heard upon the pleading and evidence for final decrees.

In the case of *Fuentes et al. v. Gaines*, the complainants sought a revocation of the probate of the will of Daniel Clark, known as the will of 1813. In the other cases Mrs. Gaines, as complainant, set up title claiming as universal legatee of Daniel Clark, under his said will, executed in 1813, to real estate in the city of New Orleans, in possession of and claimed by the defendants respectively, charged them as trustees, prayed for discovery, and for a decree establishing her title and putting her in possession.

By agreement of parties the cases were all argued and decided together.

Mr. W. R. Mills, for Myra Clark Gaines.

Mr. James McConnell, for Joseph Fuentes, complainant in the last named case, and for the defendants in the other cases.

BILLINGS, District Judge. The full argument of counsel, occupying seventeen entire days, and an examination of the records, have satisfied me that the various decisions rendered by the Supreme Court of the United States have concluded me upon very many of the questions of law which have been presented. I shall first consider the suit for the revocation of the probate of the will.

The Supreme Court of the United States in their opinion pronounced in this case (*Gaines v. Fuentes*, 92 U. S., 10), in order to determine whether it was removable from the state to the United States Court, has defined its nature and has

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characterized it as follows: "The action cannot be treated as properly instituted for the revocation of the probate, but must be treated as brought against the devisee by strangers to the estate to annul the will, as a muniment of title and to restrain the enforcement of the decree by which its validity was established, so far as it affects their property."

It is a suit which was instituted as an adjunct and means of defense to the numerous other suits for the recovery of real estate in which the complainant rested her title upon a will, the substantial allegation being that the will was admitted to probate upon false and insufficient testimony. It has now been cumulated with these other sections. It is therefore to be viewed and tried as if it were a pleading in these other actions, presenting the issue *devisavit vel non*. It presents the broad question, was there a will, unfettered by the restrictions of the code relating to actions to annul the probate of wills? Before considering the cause upon the merits, I will dispose of the plea of prescription of five years. The Civil Code, art. 3540 (3505), provides as follows: "That actions for the nullity or revision of contracts, testaments or other acts are prescribed by five years."

I think this article refers to actions brought against parties who are in possession under a will, and that it has no application to a will invoked as here, by a party out of possession as a muniment of title against those in possession not claiming under the same will, and that whenever by and against such parties a will is relied upon to establish a link in the chain of title it may be attacked. I think, therefore, the plea should be overruled.

The other exception, viz., that the plaintiffs (complainants), Fuentes et al., could not maintain their actions, as strangers to the estate of Daniel Clark, is disposed of by the fact that in the supplemental petition they claimed to have derived title from Relf and Chew, executors, or as attorneys in fact of Myra Clark, universal legatee, under the will of Daniel Clark, known as the will of 1811; and by the further fact that the consideration of this case with the others renders the petition or bill of complaint in this action in effect a

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plea interposed in the others, which may be termed direct actions.

This brings me to the question: Was there, according to the evidence presented before me, a will? Has the will of 1813 been established before me as an instrument executed by Daniel Clark, and clothed with the requisite formalities of a last will and testament according to the laws of Louisiana? It is urged by the complainants, Fuentes and others: 1. That the *proces verbal* which entitles this will to be received as a probated will is wanting. 2. That the will as probated is not shown to have been dated, and thus does not, in that respect, comply with the requirements of the law in respect to olographic wills. 3. That the evidence disproves, or fails to prove, that such a will ever existed; and, 4. That if such a will was ever executed, since it was not found after the death of the testator, the presumption of law is, that it was destroyed by the testator *animo cancellandi*, and that this presumption has not been rebutted by the proofs.

1. As to the absence of the *proces verbal*. Articles 492 and 493, C. P., give the textual provisions of the law as to what the *proces verbal* shall contain; but it is clear they cannot, with the exception of that provision which relates to the order for executing and recording the will, apply to wills, which, as in this case, are lost.

The reasoning of the Supreme Court of Louisiana, and their decree in which they order the recording and execution of this identical will without any such *proces verbal*, and when in the nature of things no such recital as is pointed out in the requirements of the Code of Practice before referred to could exist, is an authoritative decision upon the law of Louisiana on this point. [*Succession of Clark*, 11 La. An., 125.]

Judge Lee, sitting as a probate judge, while finding the proofs sufficient to establish the will, decreed against its being admitted to probate on the ground that the proof was not, in manner and form, such as the statute required. There was, therefore, no probate of the will in the lower court, but on appeal the Supreme Court reversed the decree

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and ordered the will executed. What they did in that case is a practical construction of the law upon the point as to how a lost will may be probated, and of its admissibility when so probated.

The second objection: "That the will is not shown to have been dated." Article 1588 (1581) C. C., declares "an olographic will shall be entirely written, dated and signed by the hand of the testator." On this point of date the testimony adduced before me is precisely the same as that before the Supreme Court of Louisiana at the time the will was probated. They found it sufficient—that is—they must have found that the will was dated; that the year, month and date were written by the testator.

Again, the two witnesses who read the will were Mrs. Smythe and Mr. Bellechasse. Mrs. Smythe, at page 141, probate record, in answer to the twenty-sixth interrogatory, says: "The whole of this will was in Mr. Clark's handwriting; it was dated and signed by Mr. Clark at the time I read it." At page 143, in answer to the thirty-second interrogatory, she says: "It was dated in July, 1813." Bellechasse, at page 162, probate record, says in answer to interrogatory twelve:

"The last will of Clark, to wit, the will of 1813, was legal in form because it was written wholly in his (Clark's) handwriting, and was dated and signed by him." These witnesses both testify that the will was dated, and one of them adds, "it was dated in July, 1813." The fair meaning of their language is that it bore the year, month and day; and the meaning of the language of Mrs. Smythe, that it bore date on a particular day of July, Anno Domini 1813.

If a jury had found a special verdict that the will bore date on some day in July, 1813, though they did not specify what day, so long as being in July, left it the last will of Clark, would not a court be bound to give judgment that the will was dated? And the testimony of these two witnesses, uncontradicted, is on this point equivalent to a special verdict. It is proven that the will bore date on some one of the days in July, 1813, and this is sufficient.

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The third objection, that the evidence disproves, or fails to prove, that this will ever existed; and, fourth, that if it was ever executed, since it was not found after the death of the testator, the presumption of law is that it was destroyed by him for the purpose of canceling, and that this presumption has not been rebutted.

The testimony which has been read before me is in almost all respects identical with that adduced before the Supreme Court of Louisiana (*Succession of Clark*, 11 La. An., 125, 126, 127), and is there stated with clearness and fairness by Judge Lee and by the Supreme Court, as follows:

“In looking for the testimony which might solve the question whether such a will had ever been executed or not, a reasonable inquirer would naturally turn for information to those who were most with the deceased in the latter part of his life, and especially (if they could be found) to those who were with him in the last moments of his existence, when the hand of death was on him. Such witnesses, if they had no interest in diverting his property into any particular channel, might be considered as the best and most reliable that could be produced, and it appears to be precisely testimony of this character that the petitioner presents in support of her application.

“It appears that Boisfontaine had business relations with the deceased, which brought him into frequent intercourse with him, and that for the last two days of his life, and up to the moment of his death, he was with him; that De la Croix and Bellechasse were intimate personal friends, and that they were with him shortly before his death. Now, these witnesses all concur in stating that Clark said he had executed a will posterior to that of 1811. They also testify that within a few months prior to his death he was making arrangements for the disposal of his property by a last will. He called on De la Croix to get his consent to act as executor, and also as tutor to his daughter Myra, expressing his intention of making a generous provision for her in his will. De la Croix further states that Clark afterwards presented to him in his (Clark's) cabinet a sealed packet which he declared to be his

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last will, informing him at the same time that in case of his death it would be found in a small black trunk which he had there.

“Boisfontaine, who was with Clark when he died, says that Clark in his last illness spoke of executing his last will; said it was to be found in a room down-stairs in a small black trunk; that he had left the greater portion of his property to his child, Myra; that Bellechasse, De la Croix and Pitot were to be his executors, and that about two hours before he died he instructed his confidential servant, Lubin, that in case of his death the small black trunk above referred to was to be delivered to De la Croix, and enjoined on him, as soon as he (Clark) was dead, to be sure and take it to him. He stated that Clark expressed his satisfaction that he had provided for his daughter Myra, leaving her all his estate, and that De la Croix had consented to act as her tutor. He also states that he was present about fifteen days before Clark's death, when Clark took from the small black case a sealed package and presented it to De la Croix, stating that it was his last will, recapitulating some of its provisions, and reminding him of his promise to act as tutor to his daughter. He further states that several persons, shortly before Clark's death; had seen the will, and corroborated Clark's statement as to its contents, and that Judge Pitot, Lynd, the notary, the wife of William Harper and Bellechasse were among the persons referred to.” “Now,” the judge *a quo* proceeds, “I think there can be no doubt, setting aside the testimony of Bellechasse and Mrs. Wm. Harper, that Clark did execute a will shortly before his death; that the principal object of making this will was to recognize as his daughter the present applicant, and to make suitable provision for her; that the executors of this will were Pitot, Bellechasse and De la Croix, and that De la Croix was appointed tutor of his daughter Myra; that this will must have been in existence until within a very short time previous to Clark's death, if not after that event, and that Clark himself died believing it was in existence.

“That such was the opinion of De la Croix himself at the

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time, is evident from the fact that twenty-four hours had scarcely elapsed after the probate of the will of 1811, before he made oath that he verily believed that Daniel Clark had made a testament posterior to that of 1811, and its existence was known to several persons, and he accordingly applied for and obtained an order of the court commanding every notary in the city to declare whether such document had been deposited with him."

If the foregoing facts may be considered as proved, independent of the testimony of Bellechasse and Mrs. Wm. Harper, the additional testimony of these last named witnesses, with reference to the form of the execution of the will and its contents, will rest upon a basis of probability, which must strengthen if it does not anticipate the conviction of its truth, for it is to be remembered that Clark knew how to draw an olographic will in due form, having already done so in the execution of a previous will, and knowing what was necessary to its validity it would be improbable in the extreme that he would omit any of the few necessary formalities.

When Bellechasse and Mrs. Harper, therefore, testify directly to the execution of the will, and having been written, dated and signed in the proper handwriting of the testator, they testify to the existence of facts which are, at least, probable, and upon the assumption that the will was executed, are matters approaching to certainty independent of their testimony; so with regard to the appointment of executors, of the tutor, and of the general dispositions of the will described in the petition.

They state that Clark did what he told others he intended to do, and what, from the whole tenor of his conduct, it was very probable he would do.

It does appear, however, that all the contents of the will as sworn to by Mrs. William Harper, are also sworn to by Bellechasse, and though the testimony of the latter does not contradict that of the former, but confirms it, yet his testimony does not relate to any portions of the will, except such as relate to its form, the institution of his daughter as universal legatee, and the appointment of De la Croix, Pitot

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and Bellechasse as executors. Indeed, the examination of witnesses does not appear to have been conducted with any reference to a detailed description of the will.

They, however, both state distinctly that they read the will; that it was wholly written, dated and signed by Clark; that he thereby instituted Myra Clark, his daughter, his universal legatee, and appointed De la Croix, Pitot and Bellechasse his executors. From an examination of the whole testimony, and considering the conduct of the deceased, his repeated declarations up to the very day of his death, together with his anxiety to make ample provision for his daughter, the judge of the lower court adds: "I feel satisfied that the legal presumption (which in the case of a lost will would necessarily exist) that it was destroyed or revoked by the testator, must be considered as satisfactorily rebutted."

In addition to the statement of facts and conclusions in regard to them of the judge of the lower court, it may be remarked that De la Croix states that the indorsement upon the will which he saw sealed up was in these words: "*Pour être ouvert en cas de mort.*" This indorsement does not appear in the will of 1811, and the will which he saw was doubtless the will of 1813.

The chief testimony offered by the complainant Fuentes in addition to that which is there offered, is the testimony of Mazureau's probate record, page 432, and the answers of Relf and Chew. Mazureau's letter, cannot, in my opinion, be received as evidence. It is simply a statement in writing of a person not a party to, or a witness in these causes or in any cause, and not under oath, and I know of no principle of evidence upon which it is admissible. The answers of Relf and Chew are an emphatic denial, but they do not outweigh the force of the direct and circumstantial evidence in favor of the execution of this will. In this connection I will consider the testimony of Mr. Brown, which is urged to invalidate that of Mrs. Smythe, and the letter of Bellechasse to Mr. Cox, as tending to show uncertainty in his recollection of the terms of the will. Mr. Brown testifies that Mrs. Smythe visited in his family during the summer after Mr. Clark's death; that she spoke

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often and most particularly about his death and estate, and never referred to the will of 1813. If these statements are to be considered as properly in evidence, they are to be considered as urged against the witness, to whose attention they were never called, and who, therefore, never had an opportunity to explain, or by other testimony rebut them. Mrs. Smythe was evidently attached to Myra, now Mrs. Gaines, whom she had suckled, and may have considered that there was no good then to be derived by her in speaking of the will; or, what is equally possible, she may have made reference to it which was not understood or was forgotten by Mr. Brown. A number of witnesses attest her entire respectability and credibility, and taking Brown's testimony in the most favorable light, it does not necessarily contradict and cannot avail to materially weaken the testimony of a disinterested witness, clearly intelligent, and proved by numerous witnesses to be trustworthy.

As to the letter of Bellechasse to Mr. Cox, probate record, page 855, vol. 1, he is recorded as saying: "I was one of his executors, as well as Messrs. Relf, De la Croix and Pitot." Thus adding Relf to the executors whom he and Mrs. Smythe say were named in the last will. But in the next sentence, with reference to his avowal of having received a conveyance of fifty-one lots in secret trust for Myra, now Mrs. Gaines, he uses the same names and in the same order. This all appears as a translation, the French original having mysteriously disappeared. Now, it is quite possible that either in writing out the translation of the letter, the copyist may have fallen into the error of using all the three names in both collocations, though in the first, that of Relf might not have stood in the original, or in the original letter, if, as Bellechasse states, he wrote through an amanuensis and by dictation; the name of Relf may have by mistake slipped in in one of the collocations, although the writer never designed it to be there, and never observed that it was there.

Now, as to Bellechasse, with the exception of this letter to Cox, there is nothing in the record to impugn or qualify what he says; his language and ideas throughout are those of

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an earnest, chivalrous man, who is entirely sincere. There is a further fact, that upon the death of Clark he avowed that the fifty-one lots of ground had been placed in his name in secret trust for Clark's daughter, now Mrs. Gaines. It seems to me that he appears not only as an unimpeached, but as a thoroughly upright witness, and I have never read testimony which has impressed me as uttering more frankly the truth.

I think, then, that the testimony of Mrs. Smythe and that of Bellechasse is unshaken, and they establish the will. But they are not alone. De la Croix himself was a witness in favor of the second will, though subsequently he sought to vary his testimony. On page 78 of the probate record, he says: "Clark, some months previous to his death, asked me to become tutor to Myra;" that a month or two after this conversation he, deponent, called to see Clark, who had his house on the Bayou road; he found him in his cabinet; he had just sealed up a packet, the superscription on which was as follows: "*Pour être ouvert en cas de mort*;" that Clark threw it down in presence of deponent and told him that it contained his last will and some other papers which would be of service.

It is to be observed, as the Supreme Court of Louisiana noticed, this superscription effectually proves that this envelope must have contained a will other than that of the will of 1811. The testimony of Boisfontaine, at page 79 of the probate record, states that Clark, in his last illness spoke to him about his last will and testament, and told deponent that he had left the greater part of his property to his child, Myra, and that he had made a disposition in his last will to that effect. He says Clark always told him (deponent) that Myra was his daughter; that he loved her, and would leave her all that he could as a father. It is to be observed that Bellechasse's testimony, at page 162 of the probate record, in reply to the 12th cross-interrogatory, states that Judge Pitot, the judge of the court of probate, at New Orleans, examined the will after it was finished. Mrs. Marian Rose Davis, at page 167 of the probate record, in answer to the 19th interrogatory, says, "When we were about to depart from Louisiana in

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1812, Mr. Clark said that she, Myra, would be his heir ; that he intended to leave his estate to her. He spoke in terms of great affection and pecuniary ambition about her, and again said that he should leave her all his estate ; his ambition was stimulated to make her very rich." Again, in answer to the 21st interrogatory, "He spoke of her as his heir, and in speaking of her education said, he wished her educated in a manner suitable to take in society the standing of the heir of his estate."

Samuel B. Davis, page 172, in answer to the twelfth interrogatory, says: "Mr. Clark always did manifest the warmest affection and deepest interest towards his daughter ; he has repeatedly told me that he intended to leave her his property, and I never doubted that he was entirely sincere." To the eighteenth interrogatory, on the same page, he says: "I heard him (Clark) on all occasions express himself in favor of her (Mrs. Gaines) as his daughter and heir ; it was an everyday conversation when we met." In answer to the twenty-first interrogatory, at page 173, he says: "It was impossible for any father to have manifested more solicitude and affection than he did. In my last interview with Mr. Clark his conversation turned almost exclusively on the subject of his child ; it was then that I received the instructions relative to her education, about which he seemed to be very solicitous, and about the place he wished her to take in society when she arrived at the years of maturity."

William Miller, at page 179 of the Probate Record, says, in answer to the twelfth, thirteenth and fourteenth points: "That Clark frequently expressed much affection for the said child Myra, and stated that he intended to make ample provision for her as one of his heirs."

If human testimony can establish a fact, it is here proved by overwhelming evidence that it was the settled purpose of Clark to make Myra his heir by his last will ; that for some reason, probably that stated by the Supreme Court in the 24th of Howard and 6th of Wallace, he did not, during his life-time, wish publicly to acknowledge her as his child, or admit the marriage with her mother, but that to all his

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friends he admitted that she was to be his heir. Now, can any reason be suggested why Daniel Clark, when the shadows of death gathered around him, should have changed his purpose to do this late justice to a daughter to whom he was so devotedly attached, and from whom he had withheld the enjoyment of the rights to which, as his child, she was entitled? It seems to me not. It seems to me that as his years advanced his attachment to his child and his purpose to provide for her by his last will, as was natural, continued to increase. Now, when we add to this the clear and undisputed testimony of Mrs. Smythe and Bellechasse as to the terms of this will, that it was a will made in Myra's interest, and precisely such a one as a father, with the settled purpose that the other witnesses testify he avowed to them with reference to her, would have made, that we have here conclusive testimony not only of his purpose to make this will, but that he did make it. And this testimony is drawn from precisely the sources where we would have supposed that it would be found to exist, viz., from the intimate friends of the testator.

I think if human testimony can establish the execution of this will, it is found in this record, and that an olographic will, such as is claimed by Mrs. Gaines, to have existed was made, written, signed and dated by her father, Daniel Clark. This brings me to the last question of fact, with reference to the will.

The will not being found after his death, is the presumption of law overcome by the evidence in this case? Is it proved that the will existed up to and after the death of Clark? It does not seem to me to be necessary to conclude that Relf destroyed it. Clark may have deposited it with some person who never produced it. What does the evidence show as to the continuance of its existence up to the time of his death? The mind of any one familiar with the evidence in this case, it being established by irrefragable testimony that he had made the will of 1813, would be reluctant to believe that a father who had by a last will given all his property to an only daughter, who from the reason probably that the acknowledgment of the marriage with her mother

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would have interfered with his personal ambition, had during his life time withheld such an acknowledgment from the public; had, in fact, lived a two-fold life, one part of which was necessarily inconsistent with the other, but who had centered upon this daughter all the affection which a father was capable of feeling, I say the mind of such a one would reluctantly receive the conviction that he had, without any change in his circumstances, and without any reason assigned or assignable, upon his death-bed, changed his plan and left his daughter penniless, excepting the provision which he had made for her through Bellechasse. I do not say that the presumption arising from these central facts in Clark's life would in law be sufficient to show that the will of 1813 survived him; but I do say that they prepare the mind to find in the record the testimony which will establish that fact. Such testimony is found in the statement of Boisfontaine. Boisfontaine, at pages 79 and 80, says that he was with Clark during the last two days of his life—he never left his bedside, and that during his last hours he spoke of this will and of the gratification it gave him that by means of it he had provided for his daughter. What more natural than this? What more credible? And it is testified to by a witness who is uncontradicted, excepting by a circumstance which has been attempted to be drawn from the testimony of De la Croix. De la Croix was made the tutor of Myra in the will of 1813, as well as one of the executors. De la Croix, in his testimony in the case known as No. 122, at page 536, states in substance, that the day before Clark's death he called at his house and had an interview with him; that nothing was said about the will of 1813.

The argument has been pressed with great force by the solicitors for Fuentes et al., that if Clark then had the will he would have delivered it to De la Croix, and I am asked to infer from the silence of Clark in this interview on the subject of the will, that it had ceased to exist. The conclusive answer to that argument is that whatever that interview was, it had not, in De la Croix's mind, destroyed, or at all shaken his belief that Clark had left the will of 1813 in existence at

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the time of his death, for at page 11 of the probate record, he presented to the judge of probate a petition sworn to by himself, in which he stated that he had strong reasons to believe, and did verily believe, that there was a subsequent will to that of 1811, whose existence was well known by several persons, and asked that the notaries of New Orleans be subpoenaed to see if they could not produce the duplicate of this last will—that is, the will of 1813. It is clear from this affidavit made within a day or two, or a few days after the death of Clark, that De la Croix not only believed that the will of 1813 survived Clark, but that it was executed in duplicate, and the clear implication is that he believed that one of these duplicate copies had been destroyed after the death of Clark. It further appears from this affidavit of De la Croix, that he was expressing, not only his belief, but the belief of the friends of Clark.

Now, I think the conclusion of the Supreme Court of the United States, in the case of *Gaines v. De la Croix* (6 Wall., 719), as to the effect which should be given to this statement of his, is unanswerable.

I think his subsequent testimony, given in 1848, after a controversy had arisen between him and Mrs. Gaines, goes for nothing as contrasted with his own affidavit made in 1813, and so far from the statements of De la Croix contradicting Boisfontaine, they are a powerful confirmation of his evidence upon this point, and go far to establish not only that he believed that the will of 1813 existed after the death of Clark, but that he believed it upon sufficient evidence. I think, therefore, that the presumption which under the law of Louisiana arises from the non-production of the will of 1813, and its disappearance, is most satisfactorily rebutted by the evidence in this case, and that it is proved that the will known as the will of 1813 was in existence after the death of the testator.

I, therefore, find as a fact, that an olographic will of Daniel Clark, in which Mrs. Gaines was recognized as his legitimate child, and, with the exception of the legacy to his mother, and some other small legacies, was made his universal legatee,

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was written, signed and dated by him; that this will was clothed with the requisite and legal formalities of a last will and testament according to the laws of Louisiana.

Let the decree, therefore, be, that the prayer of the petitioners in the case of Fuentes et al., etc., against Mrs. Myra Clark Gaines, be rejected.

I now come to a decision upon what may be termed the direct actions, viz., the suits in which Mrs. Gaines seeks to charge these numerous defendants as trustees, and to recover from them certain real estate, alleging that she was the legitimate child of Daniel Clark, and under his last will and testament his universal legatee. I have found as a fact, upon a fresh consideration of all the evidence, that her allegations as to the will and her heirship are established. This finding carries with it all the consequences which are necessary to establish her title to the property, and leaves nothing remaining to be considered but the plea of prescription.

The plea of the respondents is to the effect that they derived their title and have possessed the property in good faith, and that this possession has continued for more than a period of ten years. They have thus sought to dis sever their title from its origin, and have sought to stand before the court simply as possessors with what they say seemed a good title, and that therefore they are possessors in good faith. It is claimed by the solicitors of the complainant, and by his analysis of the chains of title under which the several defendants hold, it is shown that the title of each and every one of them comes back, or traces itself back to the estate of Daniel Clark through Relf and Chew, as the executors of the first will, and as the attorneys in fact of Mary Clark, legatee, under the first will. Indeed, in the supplemental petition of Fuentes et al., which has been adopted by all these defendants under the agreement on file, it is alleged at page 48 of the Fuentes case, 160 and 161 of the marginal paging, "that the said R. Relf and B. Chew were the testamentary executors of the said D. Clark under the will of 1811, and were also the agents and attorneys in fact of Mary Clark, mother and sole testamentary and legal heir of the said D. Clark, and

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as such were the parties through whom these petitioners derived title to the property now claimed by the said defendant."

It is not necessary for me to comment upon the effect of this judicial admission further than to say that it is a distinct avowal that they claim under Relf and Chew as the executors and attorneys in fact under the first will, and this leaves them in the situation of having denied what they were legally bound to know. See *Gaines v. Hennen*, 24 How., 615, 616; *Gaines v. Mausseaux*, 1 Woods, 118, and what they admit in the Fuentes case they did know.

These cases are undistinguishable in principle from that of the case of *Gaines v. Hennen*, *supra*. It is both proved and avowed in this case, which was admitted there, viz., that the title was derived from Relf and Chew by the sales under the first will. Such a title the Supreme Court of the United States, in the case of *Gaines v. Hennen*, decided was an illegal and vicious title, and that the vice of the title took from the vendees all pretense of purchasers or possessors in good faith.

In that case the Supreme Court took pains to put into their decree, after reciting the conveyance from Relf and Chew through these intermediate grantees and the conveyance to Hennen, that "the defendant Hennen at the time when he purchased the property so described and claimed by him as aforesaid, was bound to take notice of the circumstances which rendered the acts and doings of the said Relf and Chew in the premises illegal, null and void; that the said Hennen ought to be deemed and held; and is hereby deemed and held, to have purchased the property in question with full notice," etc.

This view is adhered to in *Gaines v. New Orleans*, 6 Wall., 716, 717, where the court declare that the question is no longer an open one.

The evidence here on both sides as to the minority and the interruptions of prescription is precisely what it was in the case last referred to. Indeed it is all taken from the record in that case, and I think the Supreme Court of the United

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States have settled in the most solemn and authoritative manner that this plea cannot be urged by these defendants.

Let there be judgment, therefore, for the complainant, Myra Clark Gaines.

NOVEMBER TERM, 1877.

THE CRESCENT CITY ICE COMPANY v. JAMES STAFFORD.

1. A court of probate cannot authorize an administrator to take possession of any property of which the title or right of possession is not in the estate of the intestate.
2. The title of property belonging to the estate of a decedent vested in an administrator appointed by the court of the domicile of the decedent, is not divested by the transportation of the property to another state to be sold in its markets.
3. An administrator appointed in such other state is not entitled to the possession of such property so transported thereto for sale.

IN EQUITY. Heard upon motion for an injunction *pendente lite*.

The substance of the bill was that the complainants were a commercial association, a partnership doing business under the name and style of the Crescent City Ice Co., in the city of New Orleans, whose members were composed of citizens of several states of the United States other than the state of Illinois; that the respondent was a citizen of the state of Illinois; that the firm of Hess & Reid, of Illinois, were the owners of three barges laden with ice, and that on February 24, 1877, they sold the cargoes of ice laden on the three barges to one Bowles, who paid in cash therefor the sum of \$849.25, and agreed to pay, upon the delivery of the ice in New Orleans, the freight thereon, which amounted to about \$58; that after the contract of purchase had been entered into, and while the ice was thus laden on board of these barges, and remained within the state of Illinois, the

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said Bowles departed this life. Two citizens of Illinois, to wit, Summers and Turner, were appointed administrators of her estate by the proper mortuary court having jurisdiction over the same within the state of Illinois; that they were duly qualified and entered upon their duties as administrators; that said Summers and Turner, as such administrators, finding that the value of the ice, upon its delivery in New Orleans, would not more than equal the freight contracted to be paid, sold the same to the complainants for the amount of the freight, to wit, \$58, which was paid to the said Hess & Reid, to whom the same was due; that the respondent, without any right or color of title, was interfering with the possession of complainants; that he was insolvent, and they prayed that he, his servants and agents, be enjoined from further interference with their possession of the ice.

The "exhibit A" annexed to the bill, was the contract of sale of the ice, and showed that the ice was in the first instance sold by Hess & Reid to Miss Bowles for the sum of \$849.25. It provided that the vendors should cause the barges to be towed from Quincy, Illinois, to the city of New Orleans. As the consideration for the use of said barges, and the towing of the same, Mrs. Bowles agreed to pay to Hess & Reid the further sum of \$58 as soon as the barges, or either of them, should land at New Orleans, and upon notification by telegram of the fact; the money for this payment having been deposited by Bowles in Ricker's bank at Quincy, Illinois. The contract contained an authorization to Ricker to pay the said sum upon the receipt of said telegram. The contract further provided that if all of the barges were sunk, Hess & Reid were to repay to Bowles the \$849.25, or if any of them were sunk, proportionately for the same.

The exhibits further showed the payment of \$58 to Capt. Sawyer, who received the same for Hess & Reid.

The affidavits on behalf of the respondent showed that he has been appointed provisional administrator of the estate of Bowles in the state of Louisiana, and as such adminis-

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trator, and under the order of the mortuary court in Louisiana, claimed the right to possess and dispose of said ice, and a denial in the most emphatic manner that the Illinois administrators had reduced said ice to possession within the state of Louisiana.

Messrs. J. Ad. Rosier, John Finney and H. C. Miller, for complainants.

Mr. T. A. Bartlett, for defendant.

BILLINGS, District Judge. The point was urged with great force by the solicitor for defendant, that there was a conflict of jurisdiction between the courts, and that the mortuary court which appointed the defendant administrator was seized of jurisdiction over this property. There is no conflict of jurisdiction, nor can there be in this case. It was not in the power of the mortuary court of Louisiana, by virtue of any order, to give the defendant authority to possess any property which did not belong to the estate of the decedent, and which the estate was not also entitled to possess. If any party has a better title or a better right to possess, he cannot be divested by any order of the mortuary court, and the question as to whether the property belongs to the estate of the decedent, and whether such estate was entitled to its possession, is open to all courts in which the same may be put at issue.

The only question I need consider is, whether the complainants show that they are entitled to the possession of the ice. This question carries with it the whole matter which is now before me. It is not necessary to determine the validity of the sale to the complainants, or whether it was in accordance with the laws of Illinois.

The undisputed facts are, that the personal property which belonged to the estate of the deceased was in Illinois at the time of her death, laden on board barges, bound for New Orleans under a contract which necessitated that it should be brought here charged with the freight; that the amount of freight equaled the value of the property, and that the money with which the decedent agreed to pay freight was in

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Illinois. Under these circumstances, Illinois being the domicile of the decedent at the time of her death, I think that the administrators were certainly authorized to make provision for the payment of the freight. It is not merely the case of personal property passing from the territorial limits of the state of a deceased person to another jurisdiction, but of property which had been destined and consigned under certain conditions for a market merely for sale, subject to an incumbrance which would consume the property, and might leave a residuary liability. It is the case of property shipped from the domicile of the decedent after her death to another place, merely as a place of market. It seems to me, under these circumstances, that property, vested in the administrators in Illinois, which is merely shipped into another state to be sold, does not pass out of the administrators merely by crossing the state line. It is to all intents and purposes localized, so far at least as to allow the administrators of the place of the domicile to dispose of it. Whether they have disposed of it by a valid sale, it is not necessary now to say. They certainly had the right to authorize the complainants to pay the freight, and by their paying the freight they became subrogated to the rights of the carriers, one of which is to hold the property until they are repaid. It is not the case of property merely passing into this state, but it comes destined here by the decedent as a market, and charged with a burden which, unless met by some one, would necessitate its sale by the carriers, or from the nature of the locality its destruction by the semi-tropical heat.

Justice Story, in his Conflict of Laws, section 520, says: "Indeed, according to the common course of commercial business, ships and cargoes, and the proceeds thereof, locally situated in a foreign country at the time of the death of the owner, always proceed on their voyages and return to the home point, without any suspicion that all the parties concerned are not legally entitled so to act, and they are taken possession of and administered by the administrator of the *forum domicilii*, with the constant persuasion that he may not only rightfully do so, but that he is bound to administer

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them as part of the funds appropriately in his hands." See also *Embry v. Millar*, 1 A. K. Marsh., 300.

I need not consider whether the restrictions created by the statute of Illinois as to sales by executors applies to property shipped elsewhere for market, nor need I consider the claim of the administrator appointed in Louisiana with reference to the regularity of his appointment, or with reference to his right to the custody of property found here, which was a part of the estate of the decedent, and which was not sent here for market, and not burdened with the lien for freight up to its value, and possibly of not sufficient value unless immediately disposed of to discharge the obligation of the estate for the freight. It is enough for the purposes of this application to say, that this property is in the hands of the complainants, and has been put in their hands by the administrators of the deceased, who had the right to deal with it, certainly to the extent of providing for the payment of the freight, and the payment by the complainants of this freight gives them the right to hold this property, certainly until they are indemnified.

Let, therefore, the injunction issue upon the complainants giving bond, with good and sufficient security, in the sum of \$5,000.

FREDERICK VON ROY, EXECUTOR, v. MARY B. BLACKMAN,
ADMINISTRATRIX.

1. The return of an officer touching any fact about which he was bound to make return, is conclusive on the parties to the suit and their privies.
2. The return of an officer of a fact which necessarily involves an opinion, is no exception to this rule.
3. It is the duty of a court to take notice of the sufficiency of the returns of its officers.
4. A return of a subpoena in equity which declared that the subpoena had been handed to a person at the domicile of the defendant, and who resided at said domicile, the defendant being absent, is not a sufficient return of service.

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5. The return, ~~where the~~ service is by leaving a copy of the subpoena at the dwelling-house, ~~or usual~~ place of abode of the defendant, must show that the copy ~~was handed~~ to a member of or resident in the family of the defendant.

IN EQUITY. Heard on sufficiency of plea in abatement.

The plea was as follows :

“ Mary B. Blackman, sued herein in her ~~representative~~ and individual capacity, now comes into court for ~~the~~ sole purpose of objecting to the sufficiency and legality of the service of the process by which the complainant ~~seeks~~ to subject this defendant to the jurisdiction of this honorable court, and this defendant says that there has been no legal ~~or~~ sufficient service of the subpoena, or other sufficient process to compel her to appear before this honorable court; that true it is that the marshal has returned upon the subpoena issued to this defendant herein, that he served it on the 16th day of August, 1876, by handing the same to John W. Houston, a person above the age of fourteen years, at the domicile of Mrs. Blackman, in the parish of Carroll, Louisiana, four hundred and seventy-six miles from New Orleans; that defendant avers that at the time of said pretended service, to wit, on the 16th August, 1876, her domicile and usual place of dwelling, or abode, was in Mississippi City, in Harrison county, in the state of Mississippi; that her domicile and usual place of dwelling or abode was not, on the August 16, 1876, in the parish of Carroll, in the state of Louisiana; that her domicile and usual place of dwelling or abode, for the last ten years, has been in the county of Harrison, state of Mississippi; that for the same period she has had no domicile or usual place of dwelling or abode in the state of Louisiana, and this defendant avers that said return is untrue; wherefore, the defendant prays judgment of this honorable court whether she ought to be made to make appearance and further defense to the said bill of complaint, and that she be hence dismissed at the cost of complainant, and for all general and equitable relief.”

Messrs. E. T. Merrick, Geo. W. Race and W. H. Foster,
for complainant.

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Messrs. John Finney and W. S. Finney, for defendant.

BILLINGS, District Judge. The complainant has set down the plea to be argued, and the question, therefore, is upon its sufficiency in law. It is alleged that the return of the marshal is false, and that the defendant is not estopped from urging this plea.

The authorities are numerous and weighty in support of the proposition, that in the same case the parties cannot question the return of the officer: Bennett & Heard's Mass. Digest, title "*Officer*," subdivision 5; "*Return of Officers*;" *Lawrence v. Pond*, 17 Mass., 432; Comyns' Digest, title "*Return*" (F. 2); *Barr v. Satchwell*, 2 Strange, 813; 2 Phillips on Evidence (edition of 1859); Cowan & Hill's Notes, 370; 3 Bouvier's Institutes, 190, sec. 2795; Cowan's Treatise, 335, art. 867; *Goubot v. De Crouy*, 1 Comp. & M., 773; *Putnam v. Man*, 3 Wend., 202; *Case v. Redfield*, 7 Wend., 399; *Erans v. Parker*, 20 Wend., 622.

I have endeavored to find cases which would support the proposition urged by the defendant, that where a fact involving an opinion was returned by the sheriff, there might be an exception to the rule that the return could not be denied. But the principle seems to be settled, that as to parties and privies, the return of the sheriff as to any fact which he was bound to return, is conclusive.

In *Lawrence v. Pond*, 17 Mass., *supra*, the return was as to the qualifications of the appraisers of land taken on execution.

In *Goubot v. De Crouy*, 1 Comp. & M., the return was "that the defendant was and yet is in the service of the Sicilian minister at the British court as a domestic servant." Busby moved to set aside the return on strong affidavits, showing fraud and collusion between the sheriff's officer and the defendant; that the defendant was in trade; that he had said he was endeavoring to get attached to the embassy; that he had been taken and collusively discharged by the officer. The court says: "We cannot interfere upon motion, your only course is by bringing an action against the sheriff for a false return."

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In *Case v. Redfield*, 7 Wendell, *supra*, evidence was offered that a copy of the attachment was not left at the dwelling-house, or last place of abode of the defendant, and it was excluded.

In the case of *Van Rensselaer v. Chadwick*, 7 How. Pr., 297, the court seems to hold that the return of the sheriff is not conclusive, and may be contradicted. This would be in opposition to the other cases which I find, and they are so numerous that I have no doubt upon the subject. In the case of *Earle v. McVeigh*, 91 U. S., 503, I am satisfied that the decision, so far as it involves the question here presented, was based upon the ground that the impeachment of the return was in a second suit.

The plea is therefore bad, since it traverses the return of the marshal in the same cause in which it is made.

The duty of the court to take notice of the return of its officers to its processes is undisputed. I shall, therefore, consider the question as to the sufficiency of this return of the marshal. The return is as follows:

“Received August 10th, 1876, by the United States marshal, and on the 16th day of August, 1876, served a copy herein on Mrs. Mary B. Blackman, administratrix, individually, widow in community within named, by handing the same to John W. Houston, a person over the age of fourteen years, at the domicile of Mrs. Blackman, in the parish of Carroll, Louisiana, four hundred and seventy-six miles from New Orleans, and residing at said domicile, Mrs. Blackman being absent at the time of service.”

It is to be observed that the return states that the service was made by leaving a copy of it at the residence of the the defendant, by handing the same to John W. Houston, who resided at said domicile. Equity rule 13 provides how service shall be made. It is as follows: “Service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house, or usual place of abode of each defendant, with some adult person who is a member, or resident in the family.”

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This return simply shows that Houston resided at said domicile. It does not state that he was a member, or resident in the family of the defendant. I think this defect fatal. Many persons reside in the same house with others who are not members or residents in the family of that other. A paper left with a member or resident of the family of a defendant, may well be supposed, in the ordinary course of things, to reach that defendant, but the presumption would be much lessened in case the service was made upon a possible stranger to the defendant, although he lived at the same house: *Gorham v. Peyton*, 2 Scam. (Ill.), 365.

In the note to Story's Equity Pleadings, page 63, there is this observation, "The court will set aside writs for defective or wrong returns on motion," and reference is made to the case of *Atkinson v. Taylor*, 2 Wilson, 117.

In the case of *Jobbins v. Montague*, 5 Ben., 422, the subpoena was served in New Jersey. The service was claimed to be irregular and without force, and was set aside on motion.

In *Lawrance v. Russell*, 17 Pick., 388, there was a plea in abatement to the jurisdiction. The court say, "The plea is bad, but the court will not proceed in the suit, as it does not appear that the defendants, or any estate of theirs is within the jurisdiction of the court."

In *Arden v. Walden*, 1 Edw. Chy., 631, the proceedings were dismissed for defective service, on motion.

In *Tingley v. Bateman*, 10 Mass., 343, the defendant pleaded an abatement to the writ, that at the time of the service of the same, and long before and ever since, the plaintiff, defendant and supposed trustee, were all inhabitants of the state of Rhode Island. The court held the plea bad, because it did not give the defendant a better writ, but upon the authority of *Lawrance v. Smith*, 5 Mass., 362, and upon the ground that no sufficient service was returned with which the court could proceed to adjudge between these parties, they dismissed the action.

Let the entry be that the plea be adjudged bad, and, further, that upon the ground that no sufficient service has been

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returned, the court orders further proceedings to be stayed, until there is further proof of service, or an appearance in the cause.

THE CITY OF NEW ORLEANS V. JOHN A. MORRIS.

1. The property of a municipal corporation necessary to the exercise of its functions, such as markets, prisons, etc., or property which has been destined and set apart by an act of the legislature as a permanent revenue, or source of permanent revenue for the corporation, cannot be seized or sold on execution against it.
2. A place of traffic called a market bazaar, owned by a municipal corporation for the sale of merchandise, from which the sale of fresh meats, fish and vegetables was excluded, and which had been rented out by the corporation for a term of years, is not such a market as is protected from execution, and no authority having been given by the legislature to establish such a bazaar, it is subject to levy and sale.
3. Markets are places where comestibles, perishable in their nature, are sold for the daily consumption of the people, which, from the very nature of the things therein sold, require sanitary regulations, and thus fall within the police power of cities.
4. A municipal corporation cannot, by its own act, independent of any legislative authority, make a thing which is not necessary to its municipal existence, or to the exercise of the powers which fairly belong to it, a permanent source of revenue, and thereby exempt the thing and the revenue derived from it from seizure on execution.
5. A bill in equity will not lie to restrain an execution issued on a judgment at law upon grounds which might have been urged as a defense to the action at law.

IN EQUITY. Heard on motion for injunction. The bill was filed to obtain an injunction forbidding the seizure and sale, on execution, of the market bazaar, the property of the city of New Orleans, to satisfy a judgment recovered against the city by the defendant to the bill.

Mr. B. F. Jonas, city attorney, for complainant.

Mr. Thomas J. Semmes, for defendant.

BILLINGS, District Judge. This case is before me on an application for an injunction. The hearing is upon the bill,

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the sworn answer, affidavits and a counter affidavit. There seems to be no dispute about the facts.

On the 26th day of May, 1875, the defendant in the bill obtained upon the law side of the court a judgment against the complainant for the sum of fifty-three thousand dollars, with interest. A *plurias writ of fieri facias* has issued upon this judgment at law, and under that writ there has been seized the interest of the city in a bazaar market, and the land on which the same stands.

In the year 1869 the city owned a piece of land. It executed a contract with William H. Wells, whereby he was to construct a building which was to be used for stalls for the sale of merchandise, exclusive of fresh meats, salt meats, fish and vegetables. The contract with Wells strictly followed the terms of an ordinance of the city council, which ordinance declared that the said building was made a source of public revenue. The building was constructed and leased for the period of ten years. Rent notes were given, but prior to the seizure, the unmatured notes were withdrawn and delivered up to the maker. The seizure is of the interest of the city, subject to all the leasehold rights of Wells and his assigns.

This is a bill in equity, then, to restrain the enforcement of a levy under an execution issuing upon a judgment at law. The bill sets forth two grounds upon which the decree is sought. First, that the property seized is a source of public revenue to a municipal corporation, and therefore is not liable to seizure under a *fi. fa.*; and, secondly, that the obligation on the part of the city upon which the judgment was obtained, pledged in perpetuity to the obligee certain property, and created no other obligation, and that, therefore, the plaintiff in the judgment at law, the defendant here, cannot resort to other property of the defendant beyond that to which he was restricted in the obligation.

First, that the bazaar market and the ground upon which it stands are not subject to seizure, because they are sources of public revenue to the city. It was conceded by the solicitors on both sides that certain property belonging to the city

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is exempt from seizure; the discussion upon this branch of the case being altogether as to where the line limiting the exemption should be drawn. Much light is thrown upon this subject by a careful consideration of the decisions of the Supreme Court of Louisiana bearing upon it. In *Egerton v. The Third Municipality*, 1 La. An., 435, it was held "that taxes were not the subject of a levy under an execution." In that case an attempt had been made to garnishee the tax-payers. In the case of the *Police Jury of West Baton Rouge v. Michel*, 4 La. An., 84, it was held that the court house and jail of a parish were not subjects of seizure. In the case of *Municipality No. 3 v. Hart*, 6 La. An., 570, it was held that the funds collected on judgments for taxes in the hands of a constable were not liable to seizure.

In the case of the *New Orleans & Carrollton Railroad Company v. Municipality No. 1*, 7 La. An., 148, it was held that "ground rents to which the legislature had given a destination or appropriation, as a portion of the permanent revenue of the city to enable the municipal authority to exercise its powers of police and government, were removed beyond seizure."

The circuit court, in the case of *Peterkin v. The City*, 2 Woods, 100, and in two unreported cases, that of *Hayem v. The City*, and *Klein v. The City*, No. 7801, has followed the law as laid down by the Supreme Court of this state. In the first of these cases the circuit court held that "money which had been received in payment of taxes by the city was not from the mere fact that it was deposited in a bank made subject to seizure."

In the case of *Hayem v. The City*, it was held that "a party who had given rent notes as lessee of what was beyond all dispute a market, could not compensate against these notes the ordinary obligations of the city." The case of *Klein v. The City*, was but a reiteration of the doctrine laid down by the Supreme Court of the state, in the case of the *New Orleans and Carrollton R. R. v. Municipality No. 1*, *supra*.

An analysis of all these decisions shows that the exemption has not been extended beyond two classes of cases. The one

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where the property seized, as in the case of taxes, court-houses; jails and markets was of such a nature as to be necessary to the continued exercise of the functions of the corporation, indeed, to its very existence; the other, where the property has been destined and set apart by an act of the legislature as a permanent revenue of the city, or a source of permanent revenue.

Does this case fall within either of these classes? If a market bazaar, that is to say, a place in which merchandise is sold and purchased, but from which traffic in all comestibles is excluded, can be considered a market, it would fall within both of these classes; if it cannot be considered as a market, then it would fall within neither, for it is not contended that the legislature has given the city any authority to establish a market bazaar unless it be contained in the general authority to establish market places. The nature of a market, to wit, a place where vegetables, fish and meats of all sorts are furnished for the daily sustenance of the population of a city, makes it an incident, and, indeed, a necessity, to a large and populous town.

The establishment and regulation of such places is but the exercise of the police power of a city for the preservation of the health of the citizens; but with reference to a market bazaar no such necessity exists. Any block of buildings used for selling dry goods is as much within the purview of this police power as is a market bazaar. I think, therefore, the nature of the thing is against its having any public destination, as being a municipal necessity.

Secondly, has the legislature given to the city the power to establish a market bazaar as distinguished from a market? In the amended charter of the city (acts of 1870, No. 7, pages 35 and 36, section 12), the city is given the power in subdivision fifth to fix the mode of inspecting all comestibles sold, either in the market or other public places, and by the thirteenth subdivision to establish ferries and market places. Although these clauses are separated in the charter, yet in the acts of 1816, page 92, section 1, cited in Bullard & Curry's Digest at page 100, as originally enacted,

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they occur together as a distinct branch of a sentence, as follows: "To establish one or more market places, and to determine the mode of inspection of all comestibles sold publicly either in said market or markets, or in other places."

The inference, therefore, is that the legislature originally confined markets to places where comestibles should be sold.

In the case of *Morano v. The Mayor of the City of New Orleans*, 2 La., 217, the Supreme Court, through Martin, J., says: "The city council has the power to establish markets and to provide for the cleanliness and salubrity of the city. In establishing markets they designate certain spots or places for the sale of certain articles of provisions. In doing so they facilitate the people in the purchase of provisions of the first necessity by confining the sale of them to particular places and hours of the day; and they facilitate the inspection of provisions, and by the hire of stalls they raise money to defray the expenses of building market-houses, and pay the salaries of officers they appoint to prevent the sale of unsound provisions; and they have an undoubted right to prevent the violation of the ordinances they may pass in establishing markets."

In the case of *Heirs of David v. The City of New Orleans*, 16 La. An., 404, the Supreme Court says: "In two cases, *David and Livaudais v. Municipality No. 2*, decided in December, 1853, and not reported, and in the case of *The Heirs of Guillotte v. The City of New Orleans*, decided in November, 1856, it was expressly held that a market-house is not necessarily public property, but may be the object of individual ownership. It is a place to which the public have free admission *for the purpose of purchasing provisions*. But the right of selling them is not free to the public at large. That right is usually reserved to a limited number for a rent paid."

In *New Orleans v. The Heirs of Guillotte*, 12 La. An., 818, the Supreme Court says as follows: "Although a market may not be a *locus publicus* in the sense that the ownership of the soil is necessarily vested in the public, still it is a public place in this sense. It is a place to which all persons have a right to resort daily to supply them-

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selves *with such provisions and necessaries as are there vended*; and as order and cleanliness are essential to the public welfare and health, the market, which is thronged at certain hours with all classes of persons, and filled with all manner of *perishable comestibles*, must, of necessity, be under the control of a vigorous and efficient police, to prevent it from becoming an intolerable nuisance. It is, therefore, a public place, because it is submitted to the exclusive control and government of the city authorities."

In the case of *The First Municipality v. Cutting*, 4 La. An., 335, this court said: "The right to establish markets is a branch of the sovereign power, and the right of regulating them is necessarily a power of municipal police. See Blackstone's Com., vol. 1, p. 274; Domat "Droit Public," lib. 1, sec. 3. This is vested by positive law in the mayor and council of each municipality upon whom rests the responsibility of the peace, comfort and order of the assemblages collected at fixed hours at these great thoroughfares."

I will add that markets are not established as a source of public or private profit, but for the public good.

I think that the Supreme Court in these cases in which they have incidentally spoken of markets, have unmistakably characterized them, and that, as thus characterized by that tribunal, markets are places where comestibles, perishable in their nature, are sold for the daily consumption of the people, which, from the very nature of the things therein sold, require peculiar sanitary regulations, and thus fall within the police power of cities. If this limitation be not accepted, then the right of a city to establish and regulate the place, time and manner of selling everything in which men deal must be conceded. Can it be that the legislature meant to make the police power of a city a vortex which should draw into itself the regulation of all the commerce of the city? That is the question.

It seems to me that the city, when it executed the contract under which the market bazaar was created and leased, by the very terms they employed, by their coupling together the two substantives, market and bazaar, and designating the

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place a market bazaar, show that the place which they established there, although resembling a market, was, in their opinion and intention, different from a market; that is, it was a place in which the manner of sale of articles was to be the same as in a market, but from which the things ordinarily sold in a market were altogether excluded. The method was that of a market, the matter entirely distinct.

But the whole power of the city over markets springs from the fact that vegetables and meats liable to decay and putrefy are therein sold daily in large quantities; these being excluded from the place, it loses the essential quality of a market as it is defined in our jurisprudence. I think, therefore, that the designation of this market bazaar as a public revenue rests entirely upon the ordinance of the city itself, and has a legal foundation neither in the nature of the thing nor in any act of the legislature.

But it cannot be contended that the city¹ can, by its own act and independent of any legislative authority, make a thing which is not necessary to its municipal existence, nor to the exercise of the powers which fairly belong to the municipal corporation, a permanent source of revenue, and thereby exempt the revenue and the thing from seizure under execution. If this doctrine be admitted the city might build and run factories, and, having simply declared that they made them sources of public revenue, render them exempt. I do not find that any of the decisions or the text-writers go to this length, but on the contrary, limit the exemption to the two classes of cases above specified, *first*, to such things as are necessities to the existence or successful operation of a corporation; or, *second*, to such things as by the statute have been set apart as public revenue for the city. In neither of these classes does this case fall.

The character of the title under which the city holds the land upon which the market bazaar is built has not been discovered.

Second, It is urged that the nature of the original obligation upon which the judgment of law was rendered was such

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as to preclude the defendant from making the seizure upon this property.

My own opinion in the case of *Ranger v. The City of New Orleans*, 2 Woods, 128, was cited and urged as having a bearing on this question. In that case I held that the power to tax was a prerogative of the legislature, and not in any sense judicial. That since the legislature had clearly implied in the act authorizing the obligations that they were not to be paid by taxation, the court could not direct a tax to be levied to pay them in the absence of any provision of the legislature to that effect, I therefore refused the *mandamus* directing the levy of a tax. The doctrine which I there laid down, if correct, would have been a complete defense to the action at law. The ground of the decision in that case was that the legislature had not authorized the levy of the tax. A subsequent case, in which a *mandamus* was asked to compel the city council to put a judgment into the annual budget, according as the legislature has directed should be done, with final judgments against the city, is now under consideration. In the *Ranger* case it was enough to say there was no act of the legislature authorizing the levy of the tax, and authority could not be implied, because the legislature intended the obligation should be paid out of specific property, and only to that extent was the city bound.

My conclusion in that case may be entirely correct—that the city was not bound as a general debtor upon its bonds, and my conclusion here may be equally correct, that the levy of this execution cannot be stayed. In a word, the defense to a debt is one thing, the defense against a final judgment, in which the debt is merged, is quite another.

The question in the *Ranger* case was whether the authority to levy the tax could be inferred from its having authorized the issuance of the bonds, for it was that ground alone upon which the argument for the *mandamus* was based. My conclusion was that the legislature, in the act which gave the authority, so far from giving power to tax, by implication, had negatived any such power, and, as it seems to me, limited the obligation to that of a pledge of certain specified property.

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The case of *Klein v. The City of New Orleans*, was also cited, and it was thought I had then passed upon a similar question. I have examined the bill of exceptions in that case, and find that my ruling was confined entirely to the fact that squares which were public property, which formed a portion of the wharves, or levees, and ground rents, which were considered to be public revenue, could not be seized.

Indeed, the question here is simply this: Will a suit in equity lie to restrain a seizure under an execution, issued on a judgment at law, upon grounds which might have been urged as a defense in the action at law? I find the authorities, without exception, to hold that such a suit will not lie: 3 Daniel's Chancery Practice (Perkins' edition), 1728; Kerr on Injunctions, 22, and the numerous authorities cited by these authors.

Judge Story, in his Treatise on Equity Jurisprudence, sec. 894, says:

"In the next place, courts of equity will not relieve against a judgment at law where the case in equity proceeds upon a defense equally available at law, but the plaintiff ought to establish some special ground for relief."

The injunction must, therefore, be denied.

WILLIAM T. GILMAN V. THE STEAM-TUG TYLER.

1. A steamboat was, upon a dark and stormy night, drifting in a helpless and perilous condition on the Mississippi river, blowing signals of distress, and the lives of all on board were in jeopardy, and the peril was imminent. A steam-tug, on approaching her for the purpose of affording succor to the passengers and crew, collided with and sunk her. *Held*, that the steam-tug was not liable in damages if her attempt at succor was made in good faith, and with reasonable judgment and skill.
2. In such case the degree of judgment and skill should not be weighed with scrupulous nicety.

ADMIRALTY APPEAL. On the morning of February 4, 1876, about four o'clock, the steamboat Garry Owen, which

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was the property of the libelant, collided with the steam-tug Tyler, on the Mississippi river, in front of the city of New Orleans. The effect of the collision was the breaking of a hole in the starboard side of the Garry Owen, near her stern, from which she sank and became a total loss. The libel was filed to recover of the Tyler the damages sustained by the owner of the Garry Owen from the collision.

Messrs. Charles B. Singleton and R. H. Browne, for libelant.

Mr. M. M. Cohen, for claimant.

WOODS, Circuit Judge. The Garry Owen came into the harbor of New Orleans about 4 o'clock in the morning of February 4, 1876. It was very dark, and the wind was blowing a gale from the north, and off the New Orleans shore. The wind and darkness made the landing of a steamboat a very difficult and dangerous task. The Garry Owen made several unsuccessful attempts to land—one below Canal street and others above. In making the last attempt, the Garry Owen came in collision with the steamboat Mary Bell, which was lying moored to the wharf, and the fantail of the Garry Owen was caught under the guard of the Mary Bell, and the wheel of the Garry Owen was thereby disabled, and she became unmanageable, and drifted from shore up stream and towards the middle of the river, in a helpless condition. She blew her whistle repeatedly as a signal of distress. The steam-tug Little Jerry went to her assistance, but was too small to control her movements so as to bring her to the wharf. The Garry Owen drifted toward the iron-clad monitor Canonicus, which was lying at anchor about the middle of the river, struck her and then passed between her and the Algiers side of the river, and then drifted below. She continued to blow signals of distress, and the Tyler started to her assistance, and reached her about the time that the Little Jerry cut loose from her. When the Tyler approached her, the Garry Owen was in the edge of the eddy, and had again commenced to drift up the river, carried by the force of the eddy-current.

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The complaint of the libelant is, that in approaching the Garry Owen the Tyler collided with her, and that the collision was occasioned by the gross negligence, inattention and want of proper care and skill on the part of the officers and crew of the Tyler.

The claimants assert that there was no gross negligence, or want of ordinary care, and that the collision was the result of inevitable accident.

There can be no question that the Garry Owen was helpless and in a perilous condition at the time the Tyler approached her, nor that she was then and for some time previous had been blowing signals of distress and calls for help, nor that the purpose of the Tyler was to save her and her officers, crew and passengers, who were in imminent danger of their lives.

Under such circumstances, all that was required of the Tyler was that, in making an effort to save the Garry Owen, she should act in good faith and with reasonable judgment and skill: *The Laura*, 14 Wall., 333.

The burden of proof is on the libelant to prove negligence and want of skill. The mere fact that the Tyler, under the circumstances, collided with and damaged the Garry Owen, does not of itself prove negligence or want of skill: *Owners of the Gray v. The Owners of the Fraser*, 21 Howard, 184; *The Heroine*, 6 Blatch., 188; *The Marpesia*, 1 Asp., 261.

Have negligence and want of ordinary skill been shown on the part of the Tyler? In my judgment they have not.

The almost unbroken current of the testimony is, that the night was exceedingly dark and a violent gale, almost a hurricane, was blowing. The attempts of the Garry Owen to land, and the result of her attempts, are stated by A. P. Trousdale, a witness for libelant. He says, "After we made two or three unsuccessful attempts to land, I went to the hurricane roof with Captain Gillam, the master of the Garry Owen. While I was on the roof, she attempted to land just below Canal street. At that time the other pilot had just come on watch, and not making a successful landing, and coming in so rapidly, the captain had her backed out again.

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She went out, and the next attempt she made was to land alongside the Mary Bell, and the wind and the eddy took her up so rapidly that they found she would sink the Mary Bell, or smash herself to pieces, and she was again backed out, her stern backed to the wind, and she came round against the Mary Bell's guard. Her stern landed against the Mary Bell's bow, and she landed against her. They then put a line out, and that line either broke or was not made fast at all, and the boat passed up with the eddy and the wind above the Mary Bell. The Garry Owen's wheel became unmanageable. She could not turn it. She then floated away by the stern. She went up and struck a barge or hay-boat that we were landed against there, and as she struck that, she drifted out into the stream in front of the Canonicus."

She then, according to the same witness, drifted out to the middle of the stream, and by the aid of the Little Jerry was barely able to avoid a direct collision with the Canonicus, which she passed on the Algiers side. She then drifted below the Canonicus, and had got into the edge of the eddy on the New Orleans side, and was drifting up stream, when the Tyler came to her assistance. All the time after she became disabled she was blowing signals of distress.

When the Tyler started for her she was in the neighborhood of the Canonicus, and the officers of the Tyler supposed, and had reason to suppose, that she was in imminent peril and demanded prompt succor. To save life, and for that purpose only, the captain of the Tyler swears that he went to the assistance of the Garry Owen.

When he neared her, the evidence is positive that he gave orders to back his engine and that the order was promptly obeyed. Nevertheless, the Tyler still had head-way, and the Garry Owen was carried up by the eddy, and the two collided with each other. I have been able to find no fault in the captain and officers of the Tyler. It must be remembered that the Garry Owen had just made four ineffectual attempts to land, and that in making the last she had disabled her wheel and become helpless. If the Garry Owen had found it impossible to land at the wharf without serious dam-

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age to herself, how much more difficult was it for the Tyler to approach her in mid-stream, where she was drifting helpless at the mercy of the wind and currents.

The occasion was one which appeared to demand promptitude and haste in order to save human life. It so appeared to the officers and crew of the Tyler. During a night intensely dark, with a gale blowing, the Tyler was called by the signal of distress from the Garry Owen, to render her immediate and speedy help. No more difficult or dangerous feat of seamanship could be demanded of the Tyler than to approach promptly and speedily and lay alongside the Garry Owen, herself helpless and drifting at the mercy of wind and waves. Under such circumstances, when human life was or might reasonably be supposed to be in peril, the court, in case of disaster resulting from the effort to save life, ought not to measure the degree of skill and judgment displayed with scrupulous nicety: *The Columbus*, 1 Abbott's Adm., 384; *Genesee Chief v. Fitzhugh*, 12 How., 443.

I believe that the Tyler made the effort in good faith and with reasonable judgment and skill, and although the attempt resulted in the sinking of the Garry Owen, yet the Tyler ought not to be held responsible for the loss.

Libel dismissed at libelant's cost.

THE CITY OF NEW ORLEANS v. JOHN A. MORRIS.

1. As a general rule a public place is inalienable except by the sovereign.
2. But a public place, which is a portion of the batture in front of the city of New Orleans, has a distinctive quality impressed upon it, and may be withdrawn from the use of the public by the city.
3. The leasing, by the city, of a portion of the batture for a market bazaar, for a term of ten years, for a certain rent reserved, is a withdrawal from public use of so much of the batture as is included in the lease.
4. An act of the legislature of Louisiana abolished the writ of *fieri facias* for the enforcement of judgments against the city of New Orleans, and declared that the effect of the judgment should be limited to

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fixing the amount of the plaintiffs' demand, and that said judgment should be registered and paid out of any money in the city treasury designated for its payment, and, if none were designated, that the city council might, if they deemed it proper, make an appropriation for its payment. *Held*, that the act was inoperative as to an antecedent debt, because it impaired the obligation of the contract.

5. Said act is not made obligatory upon the courts of the United States by section 916 of the Revised Statutes.

IN EQUITY. Motion for injunction based on amended bill.
Mr. B. F. Jonas, city attorney, for complainant.
Mr. Thomas J. Semmes, for defendant.

BILLINGS, District Judge. This case is before me upon an amended bill for an injunction to restrain the levying of an execution issued upon a judgment on the law side of the court. The grounds urged for the injunction in the original bill have already been passed upon. See *The City of New Orleans v. Morris*, *supra*, 103. In delivering my opinion on refusing the injunction on the first hearing, I stated that the character of the title of the city to the land was not disclosed. Such disclosure is made by the amended bill. The two additional grounds set up in the amended bill will now be considered.

1. That the land upon which the bazaar market is built is a *locus publicus*, and is, therefore, inalienable and exempt from seizure.

2. That no execution can issue upon a judgment against the city of New Orleans rendered in the circuit court of the United States sitting in this district.

As to the first ground, that the land upon which the bazaar market is built is a *locus publicus*, and is, therefore, inalienable and exempt from seizure:

The bill alleges that this land is a part of the batture or public levee belonging to the city of New Orleans, and dedicated to the public use. According to the allegations of the amended bill, therefore, the fee is in the city of New Orleans, subject to the servitude or use, for the public. Three things, then, are determined, so far as this case is concerned, with reference to this land; that the fee is in the

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city; that it is a public place, and that it is a part of the batture.

Judge Martin, in the case of *Morgan v. Livingston*, 6 Martin, 215, thus defines batture:

“In its grammatical sense as a technical word, and, we believe, in common parlance, it is then an elevation of the bed of the river under the surface of the water, since it is rising towards it. It is, however, sometimes used to denote the elevation of the bank when it has risen above the surface of the water, or is as high as the land on the outside of the bank.”

In this latter sense it is synonymous with alluvian, which is defined to be an insensible increment brought by the water. It means, in common law language, land formed by accretion.

There is no doubt of the correctness of the general proposition, that a public place is inalienable except by the sovereign, but a public place which is a portion of the batture, according to the well settled jurisprudence of this state, has a distinctive quality impressed upon it, and may be withdrawn from the use of the public by the city. This qualification is seen to be a public necessity when we consider that by the action of the vast stream which half encircles the city, the levees may be so widened as that unless a portion of them were used for buildings, and the inhabited city extended over them, the city itself would possibly be left at an inconvenient distance from the river. Accordingly we find, both in the decisions of the highest tribunal of the state, and in the act of the legislature, a clear recognition of the authority of the city to withdraw from the public use any portion of the batture which it deems no longer necessary to be held for that purpose.

In the case of *Remy v. Municipality No. 2*, 12 La. An., 502, the court say:

“The administrative control which the city council has over the alluvial deposit was settled in the case of *Municipality No. 2 v. The Orleans Cotton Press Company*, and in *Pulley v. Municipality No. 2*, 18 La., 278.”

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The corporation had the exclusive right to determine when and to what extent the riparian proprietor may take possession of the batture. Until the act of the 30th April, 1853, the riparian proprietor was bound to await patiently the action of the corporation, and was not allowed to take the initiative in limiting or terminating the public occupation of the batture.

In the case of *Remy v. Municipality No. 2*, 15 La. An., 657, the court say :

“It is recognized by many decisions that the city has, by law, the administration of the batture, and until the act of April, 1853, the exclusive right in determining when and to what extent the riparian proprietor might occupy the batture or alluvian within the limits of the corporation.”

The legislature has spoken with equal clearness upon this subject. The act No. 333, of the acts of 1853, provides: “That whenever any riparian owner of property in the incorporated towns and cities in this state is entitled to the right of accretion, and batture has been formed in front of the said owner’s land, more than is necessary for the public use, which said incorporation withholds from the owner, he shall have the right to institute suit against said corporation for so much of said batture as may not be necessary for the use of commerce and navigation, and for the necessary public highways and other public uses. And if it be determined by the court that any portion of said batture be not necessary for the public uses above mentioned, the court shall decree that the said owner is entitled to said property, and compel said corporation to permit him to enjoy the use and full ownership of such portion of said batture.”

It is to be observed that the terms of this act do not directly apply to a case where, as here, the city is the riparian owner. It provides that the riparian owner shall have the right to bring suit and have it determined whether and to what extent the batture is not necessary for the public use, and to such an extent he shall be entitled to the use and full ownership of it.

This act applies to cases where the “said corporation with-

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holds from the owner." Now, if upon a demand being made by the owner, the city should assent to his taking the portion claimed, it is clear that the legislature designed that he should so take it. For they could not have intended that a party should be placed in a worse position, where the city assented to his taking what he claimed than would be a person from whom the city withheld it. If the legislature intended, as they clearly did, to give the city the right to withdraw from public use any portion of the batture where they themselves were not the riparian proprietors, can it be doubted that they believed the city to have that right where she herself was the riparian proprietor?

The case of the *New Orleans, Mobile & Texas Railroad Company v. The City of New Orleans*, 26 La. An., 478, has an important bearing upon the question here. True it is that that case was with reference to a portion of the batture above Canal street, where the city obtained the title by grant under a compromise. But the city could have no more under these circumstances than the fee, which, under the pleadings, it has here. At page 484 the court says: "If it be urged that the third section of said act of 1850 required the portion not then laid off into streets to be kept open forever for commerce, the answer is that act No. 333, of 1853, authorized the withdrawal therefrom of such as may not be needed for public uses, and this has been done by the city."

Again the court says: "But the title of the said parties vested by the notarial act of June, 1851, is, we think, in the municipality which then took the place of the former owners, with all their rights, including the right to bring into commerce such portions as might become necessary for public use."

It may well be doubted whether the city could, under any system of pleading, be allowed to change the attitude on this point which she assumed in her original bill. The city then had the right to withdraw this property from the use of the public and to bring it into commerce. Has it done so?

The city, by its ordinance No. 1538, ordained as follows:

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“Whereas, the vacant space of ground situated in the second district, and bounded by the beef market, red stores, Peters street and the levee, has become almost worthless to the city, and a source of constant annoyance to the authorities; and,

“Whereas, the said vacant space could be made the means of producing larger revenues to the city by the erection of a Bazaar market; therefore, be it

“*Resolved*, That the city auctioneer be, and he is hereby authorized and instructed to adjudicate, after ten days’ notice in the official journal, to the highest bidder or bidders, a contract for the erection of a bazaar market and the collection of the revenues of the same for the term of ten years, on the vacant space bounded by the beef market, red stores, Peters street and the levee, second district, the market to be erected in strict accordance with plans and specifications to be furnished by the city surveyor; said market and improvements thereto belonging to revert to the city of New Orleans at the expiration of said lease, without cost or indemnity to the lessor.”

Under this ordinance the lease was executed, and the lessees went into possession. The rent has been paid for the full period of ten years. It seems to me that this is as effectively withdrawing from public use property which is no longer necessary as could be done by the decree of any court at the suit of a riparian proprietor, and that such withdrawal so made is sanctioned by the legislature and by the Supreme Court.

It follows inevitably that the city, by withdrawing this property from the public use, has changed its destination and its capacity to be alienated. The servitude of the public was lawfully terminated. It ceased to be a public thing, and became, so to speak, the private property of the city: Revised C. C., art. 458.

Nor does the argument avail that in the progress of time this property may become necessary for the public use, for according to the present charter (acts of 1870) they have the

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power of causing the expropriation of all property needed for any public use.

It is next claimed that no execution can issue upon a judgment against the city of New Orleans rendered in the circuit court of the United States sitting in this district.

The argument in behalf of the city upon this point is briefly this: The law of congress in common law cases in the United States courts has adopted the law of the state with reference to executions, and the law of the state prohibits any execution in suits where the city is judgment debtor. The law of congress, found in section 916 of the Revised Statutes, is as follows:

“The party recovering a judgment in any common law cause in any circuit or district court shall be entitled to similar remedies upon the same by execution or otherwise to reach the property of the judgment debtor, as are now provided in like causes by the law of the state in which such court is held.”

The acts of the state legislature upon which the exemption is claimed is act No. 5, passed at a special session of the legislature in 1870, page 10.

The title of the act is as follows: “An act to limit and restrict the power of courts to issue orders, writs of *mandamus* and *fieri facias* against the city of New Orleans and the officers thereof.”

Section 1 prohibits any court having authority or jurisdiction to allow, order, hear or entertain any writ or order of *mandamus*, or any order or proceeding against the comptroller, deputy comptroller or any auditing officer of the city of New Orleans, the object of which shall be, either directly or indirectly, to obtain or compel said comptroller or deputy comptroller or auditing officer to deliver or issue any order or warrant, etc.; or against the treasurer or assistant treasurer, or any officer charged with the disbursement of the moneys to enforce the payment of money claimed to be due from New Orleans, but that the proceeding must be against the city itself and not against any branch, department or officer thereof.

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Section 2 abolishes the writ of execution, or *feri facias*, to enforce the payment of any judgment, and provides, that the effect of the judgment shall be limited to fixing the amount of the plaintiff's demand; said judgment shall be registered in the office of the comptroller of the city, and that the comptroller, to pay the same, may draw his warrant against any money that there may be in the treasury designated and set apart for the purpose of paying such judgment.

Section 3 provides, that in case there is no money to pay the judgment, the common council shall have power, if they deem it proper, to make an appropriation.

If this act were to be viewed by this court as a state tribunal would be bound to view it, it would be liable to objections which impress me as serious.

In the first place, as was urged in the argument, it has been held by very high authority that any change made in the remedy which takes away the substantial right of a party to gain by his suit, that to which at the time of the making the contract he was entitled, impairs the obligation of the contract itself.

The city of New Orleans at the time this contract was made, had impressed upon it by express statute, the capacity to be sued. The capacity to be sued carries with it not only the right to bring the city into court and recover the judgment, but the right to enforce that judgment.

Lord Coke, in the Reports, part 5, page 89, defines an execution upon a judgment, to be the "life of the law," and again, at page 91, he says, "which (executions) are the fruit and the life of every law."

Writs of *feri facias* may be said to be universally the incident of a judgment for the recovery of money, which a court renders after the hearing of the case, and without them the proceedings would be for the most part vain; and when the creditor gives credit to the city upon the faith of its having the capacity to be sued, it seems to me that the argument is very strong in favor of the capacity to be sued, including all

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the proceedings necessary to take compulsorily the property of the judgment debtor.

An analysis of the act of the legislature of Louisiana with reference to the city of New Orleans shows that there can be no effective compulsion; there can be no writ of *mandamus* upon any of the officers of the city, no writ of execution against the city. The judgment creditor is limited to taking either what is found in the treasury already appropriated, or which the common council may thereafter, if they deem proper, appropriate for the payment of the judgment.

It seems to me that the chief part of the capacity of being sued, so far as the creditor is concerned, is by this act annulled. But it is not necessary for me to pass upon this question; for in my opinion the practice act of congress has not adopted this exceptional law with reference to the city of New Orleans. When congress says that the judgment creditor in the federal courts shall be entitled to similar remedies by execution or otherwise to reach the property of the judgment debtor as are now provided in like cases by the laws of the state in which the court is held, it clearly means this: That the remedies by execution or otherwise upon judgments in the federal courts shall be the same as are provided by the laws of the state for judgments in suits of the like nature; that is to say, in order to determine what remedy the judgment creditor shall have, the court in the first place examines the judgment, and sees what is the nature of the thing recovered, whether it be money or land, or a right to some office or to have some act done that should be enforced by a *mandamus*, and that then in the second place the creditor shall have the same remedies to enforce his judgment in the federal court as he would have in the state court, in judgments of a like nature, or that belong to that class. The judgment here is a judgment for the recovery of a sum of money. If we turn to the statutes of Louisiana we find (Code of Practice, article 641): "that when the judgment orders the payment of a sum of money, the party in whose favor it is rendered may apply to the clerk and obtain from him a writ of *fiери facias* against the property of his debtor."

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This then is the remedy in the state courts provided by the state law for cases like this. It is true that the legislature has seen fit to except from the operation of this law, so far as their own courts are concerned, the city of New Orleans, but that at best could be treated only as an exception which would operate upon the municipal tribunals. Congress has adopted the method which the state laws have given to enforce judgments of this class or nature, and the method thus adopted by congress is not at all affected by this exceptional provision.

Let the injunction be refused.

JANUARY TERM, 1878.

THOMAS C. ANDERSON ET AL. EX PARTE.

1. Members of the Election Returning Board established by the law of Louisiana are, even when engaged in canvassing the votes cast for presidential electors, state and not federal officers.
2. The petition of a party against whom a prosecution has been instituted in a state court, to remove said prosecution to the federal court on the ground that the same is on account of an act done under the provisions of title xxvi, U. S. Revised Statutes, should state such facts as show to the court that the case falls within the category of removable causes.

THIS was the petition of Thomas C. Anderson and others for a writ of *habeas corpus cum causa*, to remove into this court an information filed against them in the superior criminal court for the parish of Orleans, by the district attorney for said parish, charging them with feloniously publishing a false election return of the parish of Vernon of an election of presidential electors.

Mr. E. North Cullom, for petitioner.

BRADLEY, Circuit Justice. I have given careful consideration to the application for removing the prosecution in the above

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case to the circuit court of the United States, and for a writ of *habeas corpus cum causa* to that end. The right of removal is claimed under section 643 of the Revised Statutes of the United States; and under that clause of the section which authorizes a removal when any civil or criminal prosecution is commenced in a state court against an officer of the United States, or other person, on account of any act done under the provisions of title xxvi, "The Elective Franchise," or on account of any right, title or authority claimed by such officer or other person, under any of said provisions. To entitle the petitioners to the removal sought, therefore, their petition ought to show that the prosecution against them is either for some act done by them, as officers of the United States, or otherwise, under the provisions of title xxvi, or on account of some right, title or authority claimed by them under any of said provisions. Does the petition show this? It states that the information against them charges them with falsely and feloniously uttering and publishing as true, in their capacity of returning board officers, a certain altered, false, forged and counterfeited public record, to wit, the returns from the parish of Vernon of an election held for presidential electors in the state of Louisiana, on the 7th day of November, A. D. 1876, under a writ of election dated September 16, 1876, ordering the same, knowing the said public record to be false, altered, forged and counterfeit.

The petition further states that the acts for which they are accused are charged to have been done whilst they were acting under authority of law, and under oath of office, as a board of canvassers of election returns for presidential electors; and it claims that, in so acting, they were officers of the United States, and that the correctness and legality of their said election returns were duly presented by the said presidential electors before the electoral commission appointed under act of congress, passed January 29, 1877; and were by said commission fully investigated, adjudicated and sustained, and thereby became a thing adjudged.

The petition further states that all their acts in the premises were done in accordance with the true intent and meaning of

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the 15th amendment to the constitution of the United States, and of the enactments of congress passed to enforce it—those acts consisting of officially inspecting, certifying, reporting and giving effect to the votes of all the citizens legally polled at said election in said parish of Vernon, and to none other. The petition denies the charge of making false, altered or forged returns, and insists that the petitioners are prosecuted for having, in their official capacity, given effect to the laws of the United States for the enforcement of the equal, civil and political rights of citizens of the United States, growing out of and appertaining to the elective franchise.

The claim that the petitioners, in acting as members of the returning board of Louisiana, were officers of the United States in reference to the election returns of presidential electors, is not tenable. They were state officers, appointed under a state law, and acting under state authority. The claim that the correctness of their returns was adjudicated by the electoral commission, is equally untenable. The electoral commission declined to go behind the returns, or to examine into their correctness. It denied its jurisdiction to do this. These grounds of removal, therefore, are not founded on fact.

The other ground alleged, namely, that the acts on which the charge of making false returns is based, were done by the petitioners in pursuance of the enforcement laws of the United States, is more to the purpose. The difficulty is, an entire want of specification of the acts referred to. This may be owing to the fact that no specification of particular acts is made in the information against them. The charge is simply that of falsely and feloniously uttering and publishing as true false and forged returns from the parish of Vernon, of an election for presidential electors. What evidence will be presented in support of the charge does not appear. It may have no respect to the acts of the petitioners, done by them in pursuance of the acts of congress. The charge does not necessarily, nor presumptively, imply this. The petitioners can only conjecture that it will be so. In many cases there would not exist any doubt as to the specific acts complained of, and the defendants would have no difficulty in affirming

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the authority under which they were done. A revenue officer making a seizure, for example, and being prosecuted for taking the party's goods, could, with reasonable certainty, affirm what goods he was charged with taking, and could safely and with due certainty allege the authority by which he did the acts complained of, and thus be enabled to remove the cause to the federal courts. So if, in obedience to the enforcement act, an officer of election receives the votes of unregistered persons, not allowed to register on account of color, and is indicted for receiving unlawful votes, to wit, the votes of A, B and C, specified by name, or even without such specification, he could very properly affirm what particular acts he was indicted for, and could have no difficulty in removing his cause.

But in the present case the charge is for publishing a false return of an election held at a particular place. The defendants cannot allege that the return was made under an act of congress. It was not. But they suspect that it will be attempted to make out against them the falsity charged, by proving certain acts which they did under the enforcement act. This, however, they can hardly know with sufficient certainty, and if they do know it, they have not specified the acts, or class of acts, which they suppose to be the basis of the charge, so that the court may see with sufficient clearness that the case is one that is removable.

It seems to me, therefore, that no sufficient case is presented for a removal of the cause. To be entitled to removal, the case must be shown to be within the category of removable causes. The general assertion of the party that it is so, or any general assertion that does not enable the court to see that it is so, is not sufficient. But the petitioners are not without remedy. If, on the trial, it should be attempted to sustain the charge by acts of the petitioners, done by them in pursuance of the acts of congress, they can then claim the benefit of those acts; and, if refused by the court, can carry their case to the Supreme Court of the United States by writ of error.

The application must be denied.

Wells ex parte.

AT CHAMBERS, FEBRUARY, 1878.

J. MADISON WELLS ET AL. EX PARTE.

1. Where a petition is presented to a state court under section 641 U. S. Revised Statutes, for the removal of a prosecution pending in that court, to the federal court, the state court has the right to examine its sufficiency.
2. But the federal court, by virtue of its superior right to try the case, if subject to removal, is entitled to assert its jurisdiction by proper process directed to the state court.
3. Where this is done by the federal court, it will be the duty of the state court, and its officers, to yield obedience to the writs issued from the federal court to effect such removal.
4. The law passed by the legislature of Louisiana, March 13, 1877, prescribing the mode of selecting and drawing jurors, is not open to any constitutional objection.
5. A petition for the removal of a cause under section 641 U. S. Revised Statutes, which alleges that the law for the selection of jurors, which is constitutional and on its face fair, will be so administered as to secure a jury inimical to the petitioner, and which alleges the existence of a general prejudice against him in the minds of the court, jurors, officers and people, does not state facts sufficient to authorize the removal.
6. It is only when some state law, statute, ordinance, regulation or custom hostile to the rights of the petitioner, and their enforcement, is alleged to exist, that the petitioner can have his case removed under that clause of said section on which the petitioner in this case relies.

This was the petition of J. Madison Wells, Thomas C. Anderson, Louis M. Kenner and Gardone Casanave, for a writ of *certiorari* to the superior criminal court of the parish of Orleans.

This petition stated that the attorney-general of Louisiana had filed, in said criminal court, an information against the petitioners, charging them with "falsely and feloniously uttering and publishing as true a certain altered, forged and counterfeited public record, to wit, the returns from the parish of Vernon of an election held for presidential electors in the state of Louisiana, on the 7th of November, 1876, know-

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ing the same to be false, altered and counterfeited ;” that the petitioners had been arrested, and given bail, and that their trial was fixed for an early day.

It further stated that on the 23d day of January, 1878, pursuant to the laws of the United States, and particularly section 641 of the Revised Statutes, they filed a petition in the said superior criminal court for the removal of the said information and proceedings to the next circuit court of the United States of this circuit and district, for trial, and that the facts on which such application was made were fully stated and set out in said petition, duly verified by oath in accordance with said section 641. The petitioners claimed that by the presentation of said petition to the criminal court, the cause stood removed, and that the said court had no authority to proceed further in the case ; but they stated that the court and its officers, and the attorney-general, had disregarded said petition, and were proceeding with the cause in contempt of the authority of the United States court. A copy of the petition presented to the criminal court was appended to the application made to the circuit court.

The principal facts stated in the petition filed in the state court, as a ground for removing the cause, were that by reason of the ill feeling against the petitioners in the court, in the jury and in the public mind, throughout the parish of Orleans and the state, on account of their having been the returning officers of the election held in November, 1876, and republicans in politics, and of their acting in the canvass and compilation of the returns of said election, out of which the present prosecution originated, the most vindictive prejudice existed in the law-making and law-administering authorities of the state against them—they therefore believed that they would be denied their rights as citizens in the said court, and before any jury that might be impaneled therein under the existing jury law of the state, and that they would not be enabled to enforce their rights in said court in consequence of the inadequate remedies to that end provided. They further alleged that the jury law was passed March 13, 1877, and that in so far as it provided for the appointment

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of jury commissioners and the method of selecting the jury, it was intended for and operated in favor of, white citizens and against those of African descent, and that under it a jury had been drawn for the trial of the petitioners, the effect and intention of the law being to exclude persons of African descent, and other unprejudiced persons, from the jury, and to substitute in their place prejudiced white men, and thereby to deprive two of the petitioners, Kenner and Casanave (who were colored men), of a trial by their peers, and to bring them to trial by a white and prejudiced jury to the exclusion of men of their own color, and all the petitioners averred that through and by the machinery of said jury law, artfully contrived for the purpose, the state officers, and the court and its officers could and had so manipulated said law (and it was capable of such manipulation) as to deprive the petitioners of an impartial jury, and had organized a jury so prejudiced that defendants could not have a fair and impartial trial thereby, or by that court, and would be deprived of the full and equal benefit of the laws and proceedings for the security of their persons in this case. They contended that the jury law was in violation of the constitution of the United States and of the equal civil rights of the petitioners.

Messrs. John Ray and C. B. Ray, for petitioners.

1. The filing of the petition for removal in accordance with the statute, *ipso facto* removes the case from the state to the federal court: *Osgood v. Chicago, etc., Railroad Co.*, 6 Biss., 330.

2. When the case has reached the federal court, it may inquire whether the case is a removable one: Section 5, Act of March 3, 1875, 18 Stat., 472.

3. The right of trial by an impartial jury of the vicinage is one of the rights guaranteed by section 1 of the 14th amendment to the constitution of the United States, and provided for by sections 1977, 1978 and 1979, U. S. Revised Statutes.

4. The right of removal cannot be claimed solely on the ground of prejudice arising from personal unpopularity. It

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must be averred that the impairment of rights originates under color of some statute, ordinance, regulation, custom or usage of the state, but it is not necessary that the statute, etc., should on its face purport to deprive the party of his civil rights secured by law.

BRADLEY, Circuit Justice. The application now made to the circuit court and presented to me, raises these questions :

First. Was the mere presentation of the petition for removal sufficient to arrest the jurisdiction of the state court, or had that court the right to examine into its sufficiency ?

Secondly. If the court had the right to examine into the sufficiency of the application, has the circuit court the right to re-examine the same, and, if found sufficient, to issue a writ of *certiorari*, or other writ, for the removal of the proceedings from the state court ?

Thirdly. If the circuit court has such right, did the petition in this case present sufficient ground for removing the cause ?

I think the first and second questions must be answered in the affirmative. The state court surely is not bound to shut its eyes and yield to every application that comes to it. Though removal (when authorized) is a matter of right, and not of favor, yet the court must have the right to see whether the application to remove comes within the meaning of the law. I have no doubt, however, that the circuit court, by virtue of its superior right to try the cause (if subject to removal), is entitled to assert its jurisdiction by proper process directed to the state court. This view is corroborated by certain express provisions of the statutes. Section 716 of the Revised Statutes, declares that the United States courts may issue all writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. And, in the very case under consideration, it is provided by section 642 of the Revised Statutes, that if the defendant be in actual custody on process issued by the state court, and have performed all the acts necessary to a removal of his cause, the clerk of the

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circuit court is authorized to issue a writ of *habeas corpus cum causa*, which the marshal of the United States is authorized to serve by taking the body of the defendant into his custody to be dealt with in the circuit court according to law and the orders of said court, or, in vacation, of any judge thereof. This is the proper writ for removing both the cause and the person in such a case. Of course, the writ should not be issued by the clerk without being allowed by a judge of the court, which is the regular course in issuing writs of *habeas corpus* and *certiorari*. I think, therefore, that the circuit court may issue either a writ of *habeas corpus cum causa* or of *certiorari*, according as the defendant is in custody, or not in custody, for the purpose of removing the cause into that court. When this is done, it will be the duty of the state court and its officers to yield obedience to such writs; and it will be presumed that they will do so without any further inhibition, either by writ or otherwise.

The course pointed out in section 641, for the defendant to docket the case in the circuit court if the clerk of the state court refuses to furnish copies of the proceedings, is an additional and summary method of proceeding when only the clerk is delinquent. But it does not meet the exigency of a refusal on the part of the state court itself to recognize the defendant's right to remove the cause. This requires the more formal and orderly process of the court as above specified.

The removal of causes from one court to another is a form of *quasi*-appellate jurisdiction well known in the English system of procedure to which our own has constant reference. The forms of process necessary to be used for the purpose, and the principles upon which they are framed, are familiar to every student of the common law. The only peculiarity in the present case is, that the causes of removal are special and limited, and application therefor must be first made to the court *a qua*; the reason for which is undoubtedly to be found in the anxiety of the legislative department to avoid every possible cause of jealousy and complaint.

I should have no hesitation, therefore, to allow the writ of

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certiorari in this case, if I were satisfied with the sufficiency of the application. This brings me to that question.

As regards the law complained of, passed March 13th, 1877, prescribing the mode of selecting and drawing jurors, I have carefully examined its provisions, and am unable to see anything in it open to any constitutional objection. It provides for the appointment, by the judges of the principal courts in New Orleans, of two commissioners, whose duty it is made to select impartially from the citizens of the parish, qualified to vote, the names of not less than one thousand good and competent men to serve on juries. These names are to be placed in a box, and from thence is to be drawn the general panel for each term. This is the principal feature of the law. Substantially the same method is in use in several other states. The commissioners, it is true, may abuse their trust; but no system can be devised that will not be liable to abuses.

The allegations with regard to the manipulation of the law in such manner as to secure a jury inimical to the petitioners, and with regard to the existence of a general prejudice against them in the minds of the court, the jurors, the officials and the people, are not within the purview of the statute authorizing a removal. The fourteenth amendment to the constitution, which guaranties the equal benefit of the laws on which the present application is based, only prohibits state legislation violative of said right; it is not directed against individual infringements thereof. The civil rights bill of 1866 was broader in its scope, undertaking to vindicate those rights against individual aggression; but, still, only when committed under color of some "law, statute, ordinance, regulation or custom." And when that provision in this law, which is transferred to section 641 of the Revised Statutes, gave the right to remove to the United States courts a cause commenced in a state court against a person who is denied or cannot enforce any of the rights secured by the act, it had reference to a denial of those rights or impediments to their enforcement, arising from some state law, statute, regulation or custom. It is only when some such hostile state legisla-

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tion can be shown to exist, interfering with the party's right of defense, that he can have his cause removed to the federal court.

This being my view of the act, it follows that I cannot grant the application. If I am wrong the petitioners, having claimed the right of removal, and it being denied by the state court, may carry the case, after final judgment of the highest court of the state, to the Supreme Court of the United States, and obtain its judgment on the question.

The application is refused.

APRIL TERM, 1878.

A. LASTRAPES & Co. v. JULES A. BLANC ET AL.

1. The individual members of a commercial partnership held, as joint owners, a plantation, which, as such partners, they cultivated in sugarcane and other crops, and not being indebted individually, they, for the purpose of defrauding the creditors of the firm, executed a mortgage on the plantation to a third person without consideration. *Held*, that this was an act for which the firm might be put in bankruptcy.
2. Evidence which is incompetent for one purpose, but competent for another, is admissible, subject to proper instructions from the court.
3. The deposition of a defendant taken in another cause, is admissible either to contradict his oral evidence given on the trial, or as an admission by him.
4. The bankrupt law does not require the court, in its adjudication of bankruptcy, formally to pass upon the question whether the requisite proportion of creditors, in number and amount of their claims, have joined in the petition. If the defendants desire to contest this point, they should do it in the manner prescribed by the act.
5. Where a married woman was authorized by her husband to carry on business as a partner with other members of a firm, and was separate in property from her husband, *held*, that it was not necessary to make her husband a party in a proceeding in involuntary bankruptcy against the firm.

The original petition in this case was filed on May 6, 1874, by Blanc & Legendre, liquidators of the commercial

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firm of that name, against the firm of A. Lastrapes & Co., composed of Charles Lastrapes, Alfred E. B. Lastrapes, and Mary L. H. Lastrapes, wife of Dr. A. Landry; of the parish of St. Martin. The petition alleged that the petitioners were creditors of A. Lastrapes & Co., and that their demands were provable under the bankrupt act; that A. Lastrapes & Co. owed debts exceeding \$250, and that the claim of the petitioners exceeded that amount, and consisted of a promissory note signed by A. Lastrapes & Co., payable to the order of P. S. Wiltz & Co., for \$2,500, dated April 1, 1873, and payable January 1, 1874, with interest, and indorsed by P. S. Wiltz & Co. and G. D. Feriet; that A. Lastrapes & Co., within six months, did commit an act of bankruptcy, in fraudulently stopping payment upon another note made by them for \$2,000, owned by Mrs. Mary May, dated December 3, 1873, payable 30 days after date, with interest, payable to and indorsed by said P. S. Wiltz & Co., and had not resumed payment within fourteen days, to wit, by January 20, 1874, and also upon a certain draft drawn by A. Lastrapes & Co., on P. S. Wiltz & Co., dated February 21, 1873, and payable February 4, 1874, for \$2,500, payable to and indorsed by A. C. Landry; that petitioners owned said draft and notes then due, owing and unpaid.

The petition also alleged that said firm of A. Lastrapes & Co. were engaged in planting cane and cotton, and manufacturing sugar, and that the said draft and notes were issued by said firm, and negotiated to raise money to carry on the business of said firm, and that within six calendar months previous they committed an act of bankruptcy, in that they fraudulently stopped payment of their commercial negotiable paper aforesaid, and had not resumed payment within a period of fourteen days, to wit, 15th January, 1874.

The petition further alleged that A. Lastrapes & Co. had within the above period of six calendar months, being bankrupt and insolvent, and in contemplation of bankruptcy and insolvency, to wit, on December 26, 1873, committed an act of bankruptcy, in that, that said A. Lastrapes & Co., by notarial act, executed a mortgage for \$70,000 to Adeline

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Dreaux, of New Orleans, on certain lands in the parish of St. Martin, and executed and delivered twenty-eight promissory notes of \$2,500 each, drawn by them jointly and *in solido*, payable in one and two years, and that each of the partners of the firm, together with Dr. Alexander Landry, signed said act of mortgage; that said mortgage was made to prevent the said property from being taken on legal process, and with intent to delay and hinder their creditors; that said Dreaux did not lend said sum of \$70,000, or any portion thereof, and that said mortgage was executed to defeat the bankrupt act, and with intent to cover up the property and screen it from the creditors; that it was fraudulent and simulated. The petition further allèged that said Mary Lastrapes became a member of said firm with the authorization of her husband, and that she was now separate in property from him. On these allegations the petitioners prayed that the firm of A. Lastrapes & Co., in their firm capacity and individually, might be declared bankrupt, etc.

Afterwards, the act of 1874 (18 Stat., 178), amendatory of the bankrupt law, having in the mean time been passed, the original petition was amended by inserting an averment that other creditors of the defendants, making one-fourth in number and holding one-third of all the debts due by the defendants, had joined in the petition.

The answers of the defendants took issue on the material averments of the petition, and defendants having demanded a trial by jury, a jury was called and the issues of fact submitted to it. The jury rendered a verdict for the petitioners.

In the course of the trial several bills of exception were taken, and the case was brought to the circuit court by writ of error, and upon the errors assigned upon the record, the cause was heard.

Messrs. Albert Voorhies, C. B. Singleton and R. H. Browne, for plaintiffs in error.

Messrs. J. B. Cotton and L. L. Levy, for defendants in error.

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BRADLEY, Circuit Justice. Taking all the proceedings in this case together, the original and supplementary petitions, the various exceptions and answers, and the rulings of the court thereon, prior to the trial before the jury, I think it must be conceded that the case stood for trial upon the original petition, so far modified and amended as to adapt it to the requirements of the act of 1874 (18 Stat., 178), by the addition of other creditors as petitioners with the original petitioners, so as to make up (as alleged) one-fourth in number, and one-third in amount, of the creditors of A. Lastrapes & Co., the alleged bankrupts, and by an allegation that the latter had suspended payment for forty days on the commercial paper referred to in said original petition, and also so amended as to allege that the said A. Lastrapes & Co. issued the said paper as merchants. In other respects the original petition remained unchanged, and the case was tried upon the allegations contained therein, and the traverse of those allegations by the defendants. Amongst the allegations of the petition was one, that the said firm of A. Lastrapes & Co., on the 26th of December, 1873, by a notarial act, executed a mortgage for \$70,000 to one Adeline Dreaux, of New Orleans, on certain lands in the parish of St. Martin, and twenty-eight promissory notes for \$2,500 each, payable in one and two years, drawn by them jointly, and *in solido*, said mortgage being signed by all the partners individually, and by Dr. Landry, the husband of Mrs. Landry, one of the partners, and it was alleged that this mortgage was a fraudulent and simulated transaction, and that no consideration was given by said Adeline Dreaux therefor.

The questions raised on the present writ of error are solely questions of law, and appear by the bills of exception which were taken at the trial, and the assignments of error. The first, and most important of all, is this, to wit, whether, viewing the firm of A. Lastrapes & Co. as a commercial partnership, or as merchants (which the petitioners elected to do), they could, as such merchants, hold land, and could, as a commercial firm, execute any mortgage thereon. It appears by the answers of the defendants and by the proof, that the land

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which was mortgaged was a plantation inherited by the defendants from their deceased father and mother; that it belonged to them in indivision, and that they cultivated it as a sugar plantation, raising also rice and corn and other agricultural products thereon; that they ground the cane and manufactured sugar therefrom, and sold the products of the plantation. As to the allegations of the petition the defendants take issue, averring as follows:

1. That they are not bankers, brokers, traders, manufacturers or miners.

2. That they inherited their plantation and own the same in indivision.

3. That they constitute an ordinary planting partnership, to cultivate their plantation.

4. That this ordinary partnership has always been solvent.

5. That the alleged mortgage of the 26th of December, 1873, is not injurious to any creditor of said partnership; that it was made in the usual course of business, and that, besides, it was inchoate, the promissory notes secured by it not having been negotiated or discounted; and finally, that said mortgage had been canceled before this suit was brought, and within plaintiff's knowledge.

6. That the promissory notes held by plaintiffs did not constitute debts due by said planting partnership; that they were executed by none of the three members thereof, but by Dr. A. Landry, for the accommodation of A. C. Landry, without any power of attorney for that or any other purpose, and that said promissory notes were of no benefit to said partnership, and their proceeds were not used for partnership purposes.

7. That the draft held by plaintiffs was executed for the accommodation and sole benefit of A. C. Landry, and was executed in the name of this ordinary partnership by one of the members, without the authorization, express or implied, of his copartners.

Now, assuming that the position taken by the petitioners was maintainable, namely, that the commercial paper held by them was made by the defendants as a commercial partner-

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ship—a position which the jury, by their verdict, sustained—can it be said that the defendants did execute or could have executed the said mortgage as such commercial partnership, so as to make it an act of bankruptcy of said partnership?

Suppose any firm of copartners, consisting of A, B and C, hold land together as joint owners, forming no part of their partnership capital, but nevertheless liable to be taken and applied on judgment and execution against them, in satisfaction of the partnership debts; subject, perhaps, to a prior claim on the part of their respective individual creditors; suppose that this firm, A, B and C, should all join together in selling or mortgaging this land to a third person without consideration, and for the purpose of defrauding their creditors, would not this be a sufficient act of bankruptcy on the part of these persons, thus in partnership, to make the firm liable to be put into bankruptcy? Suppose that this should be done by them for the purpose of defrauding the creditors of the firm, they not being indebted in any other manner than as a firm, could not the creditors of the firm, their only creditors, throw them into bankruptcy for such an act?

Suppose that their partnership capital is, in itself, insignificant, and the resources on which they rely to pay their partnership debts are principally, and perhaps almost entirely, derived from the products of the land which they thus fraudulently convey—are the creditors of the firm, their debts remaining unpaid, to stand by in a helpless condition and see this property whisked away from their reach, and they to have no remedy?

Metaphysically, it is true, the land is not the property of the firm, and the act of conveying it is not the act of the firm; but is it not carrying the metaphysics of the law too far to say that it is not practically, and in effect, a fraudulent act of the firm, intended to cheat and defraud their creditors? Is not that the sensible view of it? Is it not the equitable view, and the one that all business men would take? It seems to me that it must be so; and that it is for the jury to say, upon the evidence adduced before them, whether it is

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not really the act of the firm, although in form only the act of the individual members of the firm.

The verdict in this case was: "We, the jury in this case, find a verdict for the plaintiffs; the mortgage considered executed for the purpose of incumbering and delaying indebtedness by the defendants in this case."

This verdict is informal; but in finding generally for the plaintiffs, it is to be understood as finding all the issues in their favor—namely, that the defendants issued the notes as merchants, that they had neglected for more than forty days to pay them, and that the mortgage was a fraudulent act.

It seems to me that the verdict cannot be disturbed on the ground that the execution of the mortgage was not a partnership act.

Another point raised by the bills of exception is, that evidence of various acts of the defendants covering a considerable period of time, some of which had been averred as acts of bankruptcy in the supplementary petitions, and had been excluded from the case as such by the court, were allowed to be proven before the jury for the purpose of showing the general design of the defendants to defraud their creditors, and thus giving character to the acts complained of in the original petition. I think the evidence was competent for this purpose, and, if competent for any purpose, it was admissible, subject to proper instructions from the court. It does not appear that the court refused to give any proper instructions which the character of this evidence required; but it does appear that the court, in allowing the evidence to be given, observed upon the limited view in which it was admissible. Had the defendants desired more specific instructions on the subject, they should have asked for them before the case was given to the jury.

The deposition of Alfred Lastrapes, which was given in evidence, was admissible on two grounds: first, for the purpose of contradicting any thing in his oral testimony; and secondly, as an admission on his part.

Another objection made to the judgment is, the want of any direct adjudication that the requisite proportion of credi-

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tors, in number and amount, joined in the petition in bankruptcy. This was alleged in the petition and was not denied in the answers—or, if any general denial of the answers may be considered as putting this point in issue, the verdict of the jury must be considered as settling it in the plaintiff's favor. The law makes no express requirement that this matter should be formally passed upon in the judgment of the court. No direct issue was made on this point by the pleadings. Had the defendants desired to contest it, they should have done so in the manner pointed out by the act (18 Stat., 181).

The only other error to which my attention has been directed is in proceeding against Mrs. Landry without joining her husband. The petition alleges that she became a member of the firm with the authorization of her husband, and that she was separate in property from him. This allegation is not denied in the answers of defendants, or either of them; and Mrs. Landry does not set up the objection. If she was authorized to carry on business as a partner in connection with the other members of the firm, and was separate in property from her husband, I do not think that it was necessary that her husband should be joined in their bankruptcy proceedings.

I think there is no error in the record, and that the judgment of this district court must be affirmed.

J. J. DONOVAN, RECEIVER, ET AL. V. JOHN DYMOND.

1. One of two part owners of a steamboat which is employed in the carrying business for their common profit cannot contract with a shipper to apply the freight earned in carrying his goods to the payment of an individual debt due such shipper from such part owner, without the consent of the other.
2. The part owners may jointly maintain a suit in admiralty to recover the freight, notwithstanding such contract.

ADMIRALTY APPEAL. This was a libel in a cause of contract of affreightment to recover the sum of \$2,580 freight for carrying the goods of the respondent on the steamer

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Emma, for a period beginning November 28, 1876, and ending March 3, 1877. The vessel, during that time, was owned by Wm. Muller and Miss Jane Canton, and was commanded by Oliver Canton, jr. It was admitted that the freight was carried, but it was contended, in the first place, that it was carried at a tariff rate somewhat lower than that charged in the bill, and the respondent claimed that it was settled for and paid by an arrangement made between him and Oliver Canton and his sister Jane Canton, whereby it was agreed that if he, the respondent, would advance money and indorse notes to enable Jane Canton to purchase one-half of the steamer, the amount so advanced should be credited on the freight to be carried for him by the steamer. This agreement was carried into effect, the respondent making the advances as agreed, and indorsing notes for the said Jane Canton, and the freight being carried for him in the vessel from and to his different plantations.

The question was, whether an arrangement thus made by one of the part owners of a vessel, to credit the freight earned by the vessel in payment of his own indebtedness, was valid and binding on the other part owners, so as to prevent them or their representatives from collecting the freight.

Mr. B. Egan, for libelant.

Messrs. J. D. Rouse and Wm. Grant, for respondent.

BRADLEY, Circuit Justice. Without stopping to inquire what a part owner might do in this direction, where he has the sole possession of the vessel and is running her on his own account, being responsible for her use to the other part owners, it is apparent that in this case no such state of things existed; the vessel was run and used for the mutual advantage of both the part owners; for, whilst Oliver Canton, as master of the vessel, may be considered as in some respects more properly to have represented Jane Canton, Muller was represented on the boat by the clerk, Donovan, who is now the receiver and libelant in this case.

It was agreed that Muller should appoint a clerk to keep the books and otherwise to represent him in the steamer's

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transactions, and whilst Muller and Jane Canton, as part owners of the vessel, were not partners, yet, in conducting the business of carrying goods in the vessel for hire, they were in the strictest sense commercial partners, and the whole business of the boat was the subject of that commercial partnership. It is further to be observed that Dymond, the respondent, was cognizant of the fact that the arrangement made between him and Jane Canton was for the private benefit of the latter, and not for the benefit of the partnership. The arrangement, therefore, was a fraud upon Muller, unless entered into with his consent, or subsequently ratified by him. It cannot be said to have been entered into with his consent, for he knew nothing of the transaction until after the agreement was made.

It is claimed by the respondent that Muller was subsequently informed of it and acquiesced in it, and, as the case stood before the district court, there was strong evidence of that fact. Oliver Canton testified that when Muller, who resides in Vicksburg, came down to New Orleans to see about the boat, after he had heard of Jane Canton's purchase of one-half interest in her, he, Oliver Canton, informed Muller of the arrangement he had made with Dymond, and that Muller did not object to it; but since the decree of the district court was rendered, Muller has been sworn in reference to that point, and distinctly and positively denies that he was informed of the arrangement, or that he ever consented to it. Other evidence in the cause would seem to corroborate his assertion. It is hardly conceivable that he would give his assent to an arrangement that would practically subject the boat to the use of the other part owner, without any advantage to him. The burden of proof, that he acquiesced in the arrangement, rests upon the respondent, and the evidence to sustain it should be, at least, reasonably clear and satisfactory. I think it must be conceded that the arrangement in question did not have the consent, and never received the ratification of Muller. I conclude, therefore, that it was a fraud upon him.

The question still remains, whether an action can be main-

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tained by Muller and his partner, Jane Canton, the latter having made the arrangement and being bound by it. There is a difference of opinion in courts of very high authority upon this subject.

It was decided by the king's bench in England, in the case of *Jones v. Yates*, 9 Barn. & Cres., 532, that where one joint plaintiff is incapable of maintaining an action against a defendant, it is a defense against all; and although the result in such a case may be to defraud the other plaintiffs, yet, it was held that the action cannot be sustained because it would enable a plaintiff to recover who had precluded himself from the right of suing, and thus to rescind his own act.

"The defrauded partner," said Lord Tenderdon, "may perhaps have a remedy in equity by a suit in his own name against his partner and the person with whom the fraud was committed. Such a suit is free from the inconsistency of a party suing, on the ground of his own misconduct."

This case has been followed by others.

In *Homer v. Wood*, 11 Cush., 62, the question was elaborately discussed, and the decision in the case of *Jones v. Yates* (*supra*) was adhered to; but in New York, Pennsylvania and other states, a different rule has prevailed, and copartners have been permitted to recover against a separate creditor of one of their number whose debt has been settled with the partnership funds, by the partner who owed him, the separate creditor having knowledge that the funds of the partnership were being used for that purpose.

Chancellor Kent says: "It is a well established doctrine, that one partner cannot rightfully apply partnership funds to discharge his own pre-existing debts, without the express or implied assent of the other partner. This is the case even if the creditor had no knowledge at the time of the fact of the funds being partnership property:" 3 Kent's Com., 43.

This was held to be the law in the case of *Rogers v. Batchelor*, 12 Peters, 221. See also *Dob v. Halsey*, 16 Johnson 34; *Gram v. Cadwell*, 5 Cowen, 489; *Evernghim v. Ensworth*, 7 Wendell, 326; *Purdy v. Powers*, 6 Pa. St., 492;

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Minor v. Gaw, 11 Smedes and Marshal, 322, and see Collyer on Partnership, §§ 492–501, particularly § 501.

It seems to me that this is the true doctrine, otherwise, the separate creditors of one partner could, in collusion with him, defraud the partnership to any extent, and compel the other partners to go into equity for relief. Where such separate creditors are cognizant of the misappropriation of the partnership funds, it seems to me more just that they should be compelled to go into equity for relief, than that the innocent partners should be compelled to do so. If the separate creditors choose thus to deal with one of the partners, they run the risk of his ability to protect them by securing the assent of the other partners—a risk which they can always avoid by requiring such consent in advance.

But whatever may be the true rule in courts proceeding according to the course of the common law, I am satisfied that in a court of admiralty, where justice is administered upon the broadest principles, and where equitable as well as legal rights, incidentally arising, are maintained, it is unnecessary to turn the parties around to seek redress in a court of chancery. There is no good reason why their rights should not be ascertained and enforced by the court of admiralty itself. The rule adopted by the king's bench, besides being rejected by respectable courts in this country, as already shown, is even questioned by able writers who admit it to be the law. (See 1 Lindley on Partnership, 168–171, cited in note to Collyer on Partnership, § 643.)

Now, in the present case, the respondent has no release, or discharge of his indebtedness for freight, even from Oliver Canton, or Jane Canton. He shows, at most, a settlement and a receipt from Oliver Canton, as master. The real basis of his defense is the agreement made by Jane Canton and Oliver Canton, that his freight should be paid by the application thereto of the indebtedness of Jane Canton to him. That agreement surely is not binding on Muller, any more than a promissory note given by Jane Canton in the name of the partnership would have been.

I am, therefore, of the opinion that the libelant is entitled

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to recover the amount of freight justly due in this case. I think, however, that the respondent is entitled to pay at the tariff rates agreed upon between him and Oliver Canton. The latter, as master of the vessel, had plenary authority to make contracts of affreightment for the vessel.

A decree will be made accordingly.

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The allowance or non-allowance of costs in an admiralty cause being a matter within the discretion of the court, is not a subject of appeal.

ADMIRALTY APPEAL. Heard on motion to dismiss the appeal.

Mr. R. De Gray, for libelant.

Mr. Charles S. Rice, for claimant.

BRADLEY, Circuit Justice. As no decree could have been rendered for the libelant by the court below, except for costs; and as the allowance or non-allowance of costs is in the discretion of the court, and not a subject of appeal, the appeal must be dismissed, but without costs to either party.

PETER SONDERBURG ET AL. v. THE OCEAN TOW BOAT
COMPANY.

J. WOODS ET AL. v. THE SAME.

JOHN GARITY ET AL. v. THE SAME.

(CONSOLIDATED CAUSES.)

1. The rule adopted in this circuit for the apportionment of salvage is to give one-half to the salving vessel and the other half to her officers and crew, in proportion to their rates of wages.
2. It is usual also to allow the salving vessel any extra expenses incident to the salvage service which she may have incurred over and above her ordinary outlays.
3. The fact that salvors were engaged but a short time in the salvage service, is entitled to but little weight in fixing the amount of their salvage.

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4. Salvage is a reward for meritorious services in saving property in peril on navigable waters, which might otherwise be destroyed, and is allowed as an encouragement to persons engaged in business on such waters, and others, to bestow their utmost endeavors to save vessels and cargoes in peril.
5. Salvage is awarded in such measure, proportioned to the value of the property salvaged, as to secure the object intended, namely, that seamen and others may have the strongest inducement to face danger and incur personal risk to save that which is in peril of being lost, whether vessel or lives or cargo.
6. As a general rule, it is much better for all parties that the apportionment of salvage among the salvors should be made by the court rather than by the parties themselves.
7. Owners of salving vessels in making distribution of salvage between themselves and the officers and crew of the vessels, should do so with great caution and after the fullest explanation of all the facts to the parties interested.
8. If done otherwise, the court will set the distribution aside.
9. When the petty officers and crew of a salving vessel, who have sued her owners for their share of the salvage, did not know the amount of salvage that had been received by the owners until just before the bringing of their suit, delay in bringing the suit could not be set up as a defense.
10. A libel *in personam* brought by salvors to recover their share of salvage against another salvor who, two years before, had received and still held the money belonging to libelants, could not be defended against on the ground that the claim was stale.

ADMIRALTY APPEAL. In January, 1875, the ship Princeton, laden with 4,000 bales of cotton, was set on fire by lightning, near the Southwest Pass of the Mississippi river, and saved by libelants, composing the crews of the steam-tugs Rio Grande and Ocean, belonging to the Ocean Tow Boat Company, and the steam tug Rochester, associated with the Ocean Tow Boat Company, and in their associated capacity engaged in the towing business upon the waters of the Mississippi river and the Gulf of Mexico. For the services of these three boats and their crews, in saving ship and cargo, the Ocean Tow Boat Company received at one time \$30,000 for salvage, and subsequently \$4,600 in addition thereto, as they claim, for towage, barge hire, guarding cotton, etc. The Tow Boat Company distributed less than one-fourth of this sum among the officers and crews of the salving tow boats.

These libels were filed about two years after such distribu-

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tion by the petty officers and crews of the tow boats to recover of the tow boat company what they claimed to be the residue of their share of the salvage.

Messrs. E. D. Craig and R. De Gray, for libelants,

On the question of proper division of salvage between the owners of the salving vessels and her officers and crew, cited *The Henry Ewbank*, 1 Sumner, 400; *The Charles*, Newberry, 329; *Mason v. The Blaireau*, 2 Cranch, 240; *The Galaxy*, 1 Bl. & H., 270; *The Charles Henry*, 1 Ben., 8; *The Bark Delphos*, Newberry, 412; *The Saragossa*, 1 Ben., 553; *The Bolivar v. The Chalmette*, 1 Woods, 397.

Messrs. Joseph P. Hornor and W. S. Benedict, for respondent,

On the same question, cited: *The C. W. Ring*, 2 Hughes, 99.

BRADLEY, Circuit Justice. The first question in this case relates to the proportion of the salvage money which should be awarded to the vessels engaged in the salvage service, on one side, and the officers and crews of said vessels on the other, supposing no binding agreement between them had been made on the subject. It is the province of the court, where the parties themselves cannot agree, not only to award the amount of salvage, but to apportion it amongst those who have contributed the salvage service. And whilst the court never loses its power to make this apportionment according to the equity and justice of each case, it is desirable to have a general rule to be followed in all ordinary cases.

I perceive nothing in the present case that should take it out of the general rule which has been adopted in this circuit; of allowing one-half of the salvage money to the vessels, and the other half to the officers and crews in proportion to their rates of pay. It is usual to allow to the owners any extra expenses which they may have been at, over and above the ordinary expenses of the salving vessels, whilst engaged in the salvage service. I am satisfied that the sum of \$4,650 which the owners received in addition to the sum of \$30,000 will cover the whole amount of such extra expenses, except

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the \$2,000 which was paid to the master of the Princeton. This, I think, may also be properly allowed, as it was paid for the common benefit, and was an extra expense. This will leave the sum of \$28,000 to be divided between the vessels and the officers and crews respectively, or \$14,000 to each.

The plea that the men were actually engaged in putting out fire but a few hours, and all other considerations of that sort, have very little to do with the case. For that matter, it might also be said that the tug boats were engaged in throwing water into the burning ship but a very short time, and that the remuneration they receive is greatly disproportioned to the actual amount of service rendered. This is not the principle on which salvage is allowed.. It is not the principle on which the amount was settled upon in this case. Salvage is a reward for meritorious services in saving property on navigable waters, in peril, and which might otherwise be destroyed, and is allowed as an encouragement to all persons engaged in business at sea or on navigable waters, and others, to bestow their utmost endeavors to save vessels and cargoes which are in imminent peril. Viewed in this light, it is awarded in such measure, proportioned to the value of the property saved, as to secure the object intended, namely, that mariners and sea-faring persons and others may have the strongest inducements to face every danger and to incur every personal risk in order to save that which is in peril of being lost, whether ship, or lives, or cargo.

The next question is, whether the libelants are bound by the agreement which they made with George McClelland, to take the several amounts which he paid them, when he settled with them in February, 1875.

As a general thing it is much better for all parties that the apportionment of salvage money should be made by the court than by the parties themselves. There is such a strong temptation for the owners of the salving vessels to speculate upon the improvidence of the men (who are always easily satisfied with a handful of ready cash), and to work upon their fears of losing their situations, that they will be exposed

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to the suspicion of doing these things even when they have intended to act with perfect fairness. The men are placed at a disadvantage anyhow. If they are firm in standing up to their rights (supposing they fully understand them), they are naturally looked upon by their employers as animated by a spirit of opposition and pertinacity, and the result often is that they are unjustly discharged. But it oftener happens that they do not understand their rights, and that they are easily persuaded to accept a less proportion than they are justly entitled to.

For these reasons owners should be very cautious about making such settlements with their men. It should never be done except with the fullest explanation of all the facts, so that every thing may be transacted understandingly and above board. If done otherwise the court should not hesitate to set the arrangement aside. This is the general course pursued in all cases of attempted settlements with seamen. They are regarded as incompetent to take care of their own interests, and they are therefore looked upon as wards of the court.

I think the settlement made with the men in the present case ought not to be binding upon them. It is manifest, from the evidence, that they were not informed, and did not know, when they made the settlement, that an allowance of \$30,000 salvage money had been agreed upon by the parties. Yet this had been agreed upon nearly or quite a week before. Without looking any further, it seems to me that the suppression of this important fact is sufficient to deprive the arrangement of all binding force and validity.

It has been suggested that if the crews were competent to empower George McClelland to represent them in settling the amount of salvage money with the owners of the ship and the agent of the underwriters, they should be regarded as equally competent to settle for their own proportion of the money, and should be equally bound by their own acts. But the two things stand on an entirely different footing. They might well intrust George McClelland, or any other person, with power to co-operate with the owners of the tugs in mak-

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ing a settlement for the salvage service, for they might be well assured that the owners would look sufficiently well after their own interests to protect that of all parties concerned in the salvage. Besides, in that matter, George McClelland would have no interest opposed to theirs. But when it came to a settlement of their proportion of the money, George McClelland really represented the owners of the tugs. This was the necessary relation of the parties. The less he could get them to take the more the owners would receive. The money which he actually paid to the men was afterwards refunded to him by the owners, out of the \$30,000 received by them.

It has been suggested that this \$30,000 was not all for salvage, but partly for towage, lading and unlading, etc. This plea can hardly be sustained. In the first place, if there is any such admixture of moneys and considerations, it is the fault of the owners for making it. No separate account of any such towage or loading and unloading is presented; and it is fair to infer that all service of that kind was amply covered by the extra sum of \$4,650 which was subsequently received.

The only other point is the question of delay in bringing these suits. On that I have no difficulty. It is not shown that the libelants knew of the settlement which had been made, and the amount of salvage money which had been received, until the suit was brought; on the contrary, the evidence is that they did not know of it. This, of itself, would sufficiently account for the delay, if there were any delay to be accounted for. But I do not see that an action *in personam*, such as this is, against those who have received and still hold moneys fairly belonging to the libelants, can be said to be a stale demand, in the admiralty sense, by reason of any lapse of time which has taken place in this case. At all events it is unnecessary to pursue the subject, since I am perfectly satisfied that under the circumstances of this case the exception ought not to prevail.

The decree of the district court will be affirmed, except as to the allowance to the respondents of the sum of \$2,000

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paid by them to the master of the Princeton, which is first to be deducted from the \$30,000 before the division is made.

The respondents (the appellants in this court) will be decreed to pay the costs.

Let a decree be made accordingly.

(The decree can be modified by deducting one-fifteenth part from the amount decreed to each libellant in the court below.)

DANIEL WEAVER V. CHARLES E. ALTER ET AL.

1. A controversy between co-defendants to a bill in equity cannot be the matter of a cross-bill, unless its settlement is necessary to a complete decree upon the case made by the original bill.
2. The annulment by decree of court of a tax sale of premises mortgaged to secure notes held by different parties, inures to the benefit of all such holders, and not solely of the holder at whose suit the decree was made.
3. Where, according to the jurisprudence of Louisiana, property mortgaged to secure several notes has been sold, at the suit of the holder of one of the notes, for a sum insufficient to discharge the entire mortgage debt, and he has been paid his *pro rata* share of the proceeds of sale, the purchaser takes the property subject to the lien of the mortgage which secures the *pro rata* share of the other holders of notes. In such case, the prescription of one of such notes does not inure to the benefit of the other holders of notes secured by the mortgage. The *pro rata* share of each note holder is unaffected thereby.

IN EQUITY. Heard for final decree upon pleadings and evidence.

The bill was filed by the complainant, who was the holder of one of the notes secured by a mortgage to recover from the purchasers of the mortgaged property, who had become such at a sale ordered by the court in a suit to enforce the mortgage, his share of the purchase price and to assert his lien therefor on the mortgaged premises.

The facts were as follows: The complainant and respondents each held one or more promissory notes which were secured by a common mortgage upon the Ormond plantation,

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a plantation situated in the parish of St. Charles, in this state. The common mortgage was executed in the year 1871. Subsequently the mortgaged property was sold for taxes to Henry Shepherd. Within the period allowed for redemption of property sold for taxes, Alter, one of the respondents, tendered to Shepherd the amount paid by him at the tax sale, with the fifty per centum of interest, which amount Shepherd refused to receive. Thereupon, Alter instituted a suit against Shepherd to annul the tax sale on account of certain irregularities, and, *as owner*, to redeem. The Supreme Court of this state (*Alter v. Shepherd*, 27 La. An., 208) held the sale regular, but on account of the seasonable tender of Alter, who they held, as one of the mortgagees, came within the meaning of the term owner, decreed that the tax sale should be annulled and vacated.

Alter then as holder of the notes secured by mortgage, obtained judgment and caused the mortgaged property to be seized under an execution, by the sheriff of the parish of St. Charles and sold. At this sale Alter became purchaser of a large portion of the mortgaged property, and Mrs. McLean, the other respondent, of the remaining portion. The property brought at this sale \$24,205.

Mrs. McLean, one of the respondents, filed a cross-bill, in which she alleged that the price of the portion of the mortgaged property which she bought was not equal to the amount of the whole price, which, upon a *pro rata* division, would come to her, and she sought to recover the deficiency from her co-defendant Alter. To this cross-bill both the complainant and the respondent Alter demurred.

One of the promissory notes secured by the common mortgage, it was alleged, had become prescribed since the sheriff's sale, though it was not contended that it had become prescribed prior thereto.

Both the complainant and the defendant, Mrs. McLean, insisted that the prescription of this note should inure to their benefit, and thus increase ratably the amount of the realized price to which they were entitled as co-mortgagees.

Messrs. J. D. Rouse and Wm. Grant, for complainant.

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Messrs. T. J. Semmes, Armand Pitot, M. M. Cohen, Jos. P. Hornor and W. S. Benedict, for defendant.

BILLINGS, District Judge. The questions presented for decision arise on the cross-bill, and relate to the effect of the redemption from the tax sale by Alter, and the effect of the alleged prescription of the non-presented note.

First, Is the matter set up by way of cross-bill, properly matter of a bill not original? The most precise definition of a cross-bill which I have been able to find in the text-books, is in Cooper's Equity Pleadings, page 85. "A cross-bill," says he, "is a bill which *ex vi terminorum* implies a bill brought by a defendant in a suit against a plaintiff respecting the matter in question in that bill. But sometimes it is brought against the co-defendants in such depending suit, where they have opposite claims which the court cannot determine in such depending suit upon the bill filed, and the determination of such clashing interests is still necessary to a complete decree upon the subject matter of the suit. But in such last mentioned case, the original plaintiff must be named a defendant, together with the defendants in the first cause. See also to the same effect, Story's Eq. Pl., §§ 392, 396; *Wright v. Miller*, 1 Sandf. Ch., 123; *Galatian v. Erwin*, 1 Hopk. Ch., 48; *Shields v. Barrow*, 17 How., 145; *Cross v. De Valle*, 1 Wall., 14; *Ayres v. Carver*, 17 How., 594 and 595, and *Rubber Company v. Goodyear*, 9 Wall., 809, 810. Now, the matter of the complainants' suit here is to recover, with privilege; so many dollars and so many cents from the defendant Alter as his ratable proportion of the price of the portion of mortgaged property bought by him, and from defendant Mrs. McLean, a fixed sum as the ratable proportion of the price of the portion of the mortgaged property bought by her. The subject matter of the cross-bill is a settlement between these two defendants of the balance due from one to the other, resulting from the price severally paid, and to be paid by them, as compared with the respective amounts of their mortgaged notes. With this accounting the complainant has no sort of interest. It could

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not at all affect his rights, nor qualify the decree in his favor. It has no more to do with the case, as presented by him, than would a cross-bill between defendants whom he had sued as members of an ordinary partnership for their virile share of a debt due by a partnership, where one defendant should interpose a cross-bill asking, as against a co-defendant, an accounting with reference to all the partnership affairs. The fact that both defendants are citizens of the state of Louisiana, would prevent the court having jurisdiction over the controversy presented by it, viewed as an original bill. As a cross-bill, it must fall, as presenting nothing which is necessary to a complete decree upon the subject matter of the complainant's case. The obligation of the defendant Mrs. McLean to the complainant, became distinct from that of her co-defendant when each concluded a purchase of a portion of the mortgaged land at the sheriff's sale, and he cannot be made to be embarrassed by any accounting between them.

Secondly. As to the effect of the proceedings by the defendant Alter to annul the tax sale. Precisely what this proceeding was appears in the statement of the case by the Supreme Court, in *Alter v. Shepherd*, 27 La. An., 208; they say the plaintiff, as holder of several promissory notes secured by mortgage, sues to annul a tax sale of the mortgaged property and a subsequent sale thereof by the purchaser, on the grounds of alleged defects and informalities in the tax sale, collusion therein in the second sale, and his right as mortgagee to redeem the land, which he alleges he offered to do according to law within the legal delay."

The court then proceed to discuss the question whether Alter, the plaintiff in that suit, as mortgagee, came within the meaning of the term "owner" as used in the statute of 1873, and decide that he did, and that, as owner, he was entitled to redeem, and decree "that the tax sale and all subsequent sales of said property be annulled upon Alter paying to Shepherd the amount of the tax, with the additional penalty of 50 per cent imposed by the statute; that Alter have judgment against the maker of the notes for \$33,750 (the

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amount of the mortgage notes held by him), with interest, with vendor's privilege and mortgage."

I think this decree interprets itself. It annuls the tax sale and the subsequent sale which still further conveyed the property, upon the refunding by the mortgagee of the amount of tax and penalty, and gives judgment for the amount of the notes secured by the common mortgage held by Alter, with vendor's privilege.

They have simply vacated the tax conveyance, leaving the property subject to whatever privilege and mortgage were upon it prior to the execution of the conveyance. They have not increased or diminished the extent of Alter's privilege.

Of course equity will require that the amount paid by Alter, which inured to the benefit of himself and his co-mortgagees, with the interest, should first be re-imbursed to him out of the proceeds of the mortgaged property, but with that exception the relative rights of the parties secured by the common mortgage remain unchanged.

Indeed, had the Supreme Court designed to make their decree inure to the benefit of Alter solely, they would have decreed, not the annulment of the conveyance, but a conveyance from the tax sale purchaser or his transferee to Alter.

It was urged that the rule prescribed by the Civil Code, arts. 1970 and 1977, which direct that, in case the revocatory suit brought by a judgment creditor to annul a contract made by his debtor in fraud of his rights, is maintained, that the property which was the subject of the contract should be applied to the judgment of the plaintiff. But these articles provide for the revocation of the fraudulent contract only so far as relates to its effects upon the complaining creditor. The mortgagee in this case had no right in equity to have a preference over his co-mortgagees. Nor did the decree of the Supreme Court give him any. It annulled the sale, and that cancellation operated necessarily in aid not only of the plaintiff in the suit, but of all parties holding concurrent mortgages. The suit of *Alter v. Shepherd*, *supra*, was not a suit under these articles of the code, but a suit to enforce the rights of Alter to redeem, as an equitable owner, under the

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law regulating the sale of land for taxes. When viewed as such an action, it gave the plaintiff only the right to redeem for himself and his co-mortgagees.

Thirdly. It is urged, both by the complainant and the respondent Mrs. McLean, that one of the notes for the sum of \$5,000, secured by the common mortgage, has, since the sheriff's sale, become extinguished by prescription, and that this fact should to that extent reduce the mortgage and ratably increase the amounts coming to them respectively.

The theory of the law as to the effect of a judicial sale provoked by one of several parties holding concurrent mortgages is, that the sale does not extinguish the other mortgages created by the same act and at the same date.

If the mortgaged property does not bring enough to satisfy in full all the concurrent mortgagees, the sheriff should collect the *pro rata* share of the seizing creditor, and the portion coming to the other mortgagees should be left in the hands of the purchaser, subject to their call and secured by their mortgages: *Pepper v. Dunlap*, 16 La., 163, and *Scott v. Featherston*, 5 La. An., 306. If, then, as in this case, the property brought less than enough to satisfy the common mortgage so far as the purchaser is concerned, after paying to the seizing creditor his *pro rata* of the proceeds of the sale, he would assume a debt to each of the other holders of the mortgage notes equal to his *pro rata* share of the proceeds, who, from the time of the sale, has, as against the purchaser and the property in his hands, a claim secured by his mortgage for a sum thus judicially ascertained. If, after the sale, extinguishment of one of the mortgage notes takes place, the same effect is wrought, so far as relates to the purchaser, as would be brought about if he had purchased property subject to an indivisible claim secured by a mortgage. The extinction of the claim would extinguish the mortgage: *Grayson v. Mayo*, 2 La. An., 927. So here, if one of these notes secured by the common mortgage has, since the sheriff's sale, been extinguished, it has not affected the claims or privileges which the other holders of similar notes have against the property or purchaser. Had there been no sale, the extinc-

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tion of one of the notes by prescription would have inured to the benefit of the holders of the others. But the intervention of a third person under a judicial sale, with liabilities fixed by the sale, prevents, so far as he is concerned, that result. The *pro rata* share of each holder of the mortgage notes remains unaffected.

In the language of the Supreme Court, in *Scott v. Featherston*, *supra*, "the portion coming to the other mortgage creditors would, in that case, remain in the hands of the purchaser, subject to their call and secured by their mortgages."

As to the defense set up by the respondent Alter in his answer and cross-bill, that the complainant, as pledgee, cannot recover, I think, according to the proofs and under the law of Louisiana, it cannot be maintained.

The demurrers to the cross-bill of the respondent Mrs. McLean must be sustained, and the complainant must have a decree against the respondents Alter and Mrs. McLean, severally, for the *pro rata* share of the price of the portion of the mortgaged property purchased by them respectively, with interest, less the amount as against the respondent Alter of his payment to effect the redemption, with the addition of expenses and interest.

JOHN W. CANNON V. THE STEAMER POTOMAC.

1. A collision took place between two steamboats caused by the fault of both, but the fault of one was greater than that of the other. *Held*, that the court could not gauge the demerit of the boats in assessing the damage to be borne by each. If both were in fault, though in different degrees, the damage should be equally divided between them.
2. Demurrage forms a fair subject for the allowance of damage in collision cases.
3. Two steamboats had collided with each other by the fault of both, and were adjudged to pay each one-half the damage. One of the boats received insurance money to cover part of her damage. *Held*, that it was not to be deducted from the share which the other steamer was adjudged to pay, even though the underwriters had voluntarily released her from all claim for her fault in causing the collision.

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4. In such case, the owners of the insured boat were allowed to apply their insurance money to that portion of their loss for which they had no redress against the other boat.

ADMIRALTY APPEAL. The libel was brought by the owner of the steamboat Lee against the steamboat Potomac, to recover damages for a collision which took place between the two boats on the Mississippi river, about one mile above Natchez, on the morning of December 21, 1870.

Both boats were damaged by the collision, but the injury sustained by the Lee was much the greater.

Mr. B. Egan, for libelant.

Mr. J. Ad. Rosier, for claimant.

BRADLEY, Circuit Justice. If I were to believe the evidence of the officers of the two boats which came into collision in this case, I should be forced to the conviction that a collision was utterly impossible. They show most clearly, on the one side and the other, that both vessels had come to an entire stand-still, if they were not, in fact, backing, before they met. That both vessels gave signals when they were 800 yards apart, but neither heard that of the other, which I can only account for on the supposition that they were given at the same instant of time. The flat contradictions which we are obliged to encounter in cases of this sort are a melancholy evidence of the effect of self-interest on the memories, if not on the consciences, of men.

Some facts, however, seem to be indisputable. Both sides agree that a collision did in fact occur, and that serious damage was inflicted on both vessels. They concur also in the fact that the collision occurred nearer to the Mississippi than to the Louisiana shore, and at no great distance from the former—as near, in fact, as was safe for large steamers to run at that stage of the water—and to the east of the center line of the channel. They concur in the fact that the two vessels did not meet head on, but at an angle of at least forty-five degrees, if not greater than that, the starboard of the Potomac being presented to the larboard of the Lee, in such a manner that the stern of the former was driven almost

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squarely into the bow of the latter, penetrating to her keelson. A very slight difference in their positions, that is, if the Lee had been a few feet to the larboard of her position, or if the Potomac had been a few feet to the larboard of hers, without any change in their relative angle of direction, the thing would have been reversed, and the Lee would have penetrated the bow of the Potomac in exactly the same manner as the Potomac did that of the Lee. Which of them should be the penetrating vessel was a sheer matter of accident. There is nothing in that circumstance which throws the least light upon the question where the fault lay. That there was fault somewhere must be conceded. Two such manageable boats as these were, could not have come together with so much water-way as they had, and in such a clear and quiet night, without some carelessness or inattention on one side or other, or on both sides.

I have stated that it is a conceded fact that the vessels came together at an angle of at least forty-five degrees. The weight of evidence is, that they even struck more squarely than that; that is, that at the time of collision, they were crossing each other's course more directly and squarely than at an angle of forty-five degrees. The officers on each side, respectively, endeavor to throw the blame of this upon the other side. The officers of the Lee say that she was heading straight up the river, and that the Potomac, being further out in the channel, as she approached the Lee, turned around to the larboard, as if she were rounding to at a landing, and struck the Lee nearly squarely upon her bow. On the other hand, the officers of the Potomac say that she was heading straight down the river, following the bend of the Mississippi shore, and that the Lee, being on the Louisiana side of the channel, in the vicinity of the bar there, turned to the starboard and attempted to cross to the Mississippi side, in front of the Potomac, and athwart the course she was properly pursuing. Either of these statements would account for the angle at which the vessels came together; but they are directly opposed as to which vessel was following the line of the channel, and which was crossing it. The angle at which they

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met we are certain about, but the course of the respective vessels at the moment of meeting, relative to the line of the channel, is disputed by directly contrary averments on each side.

There is a third hypothesis which would bring the vessels together at the angle at which they struck, and which would not require that either of them should have crossed the channel, namely, by supposing that both vessels were pursuing the general line of the channel, on the Mississippi side of it, and approaching each other nearly head on (which, if both are to be believed with regard to their own vessels respectively, must have been the case), and that just before meeting, both vessels, in order to pass each other, turned in the same direction, towards the Mississippi shore, the Lee to her right, and the Potomac to her left, as two men sometimes do on the side-walk, and thus come together. This manœuvre would cause them to meet at the angle they did, and would be in harmony with all the absolutely certain facts of the case. It would square with the assertion so positively made on both sides, that they were on the Mississippi side of the river, and that they were following the general course of the channel. It would also accord with the facts asserted on each side respectively; by the pilot of the Lee, that he intended to pass the Potomac on the right, and by the pilot of the Potomac, that he intended to pass the Lee on the left. They both say that they signaled respectively to that effect. Is it not possible that as they approached each other, and found that they were in close proximity, each urged his helm in the direction of his thoughts, on the supposition that the other was apprised of his intention, and would pursue the same idea? This supposition would produce exactly the results which actually happened, and would relieve the parties from the imputation of a great deal of gratuitous swearing. To appearance it would be true, that the approaching vessel would seem to be attempting to cross the track of that on which the observer stood. I am disposed to think that this is the true solution of the relative movements of the vessels, and of a great deal of the apparent contradiction in the testimony.

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The question then arises, which party was to blame for not avoiding this collision? It certainly need never to have occurred if proper diligence had been observed on both sides. Where is the want of diligence to be found? By the rules of navigation on the Mississippi river, it was the duty of each party to signal the other as to the side on which he would pass. It was the duty of the Lee, as the ascending steamer, to do this first, and if she met with no response from the other steamer when they were within eight hundred yards or half a mile of each other, to stop and back until she could succeed in getting some response. The officers of the Lee say that such signal was given by them, viz., one whistle, indicating their intention to pass on the starboard side, and that they did not get any responsive signal from the Potomac; hence it was clearly their duty to proceed no further, but to stop and back and wait.

On the other hand, the descending boat, the Potomac, had a right to control the mode of passing by signaling her intention; and her officers say that she did give the signal of two whistles, indicating her intention to pass on the larboard side, but that they heard no signal from the Lee. Then it was their duty, when within eight hundred yards of the Lee, to stop and back until a communication could be exchanged. This they say they did.

Now, if the statements on both sides be true, it is impossible that a collision could have occurred. Eight hundred yards distance was abundantly sufficient to enable them to check their speed and come at least to an entire stand-still before meeting. It is evident that either one, or both, did not perform that duty; they could not both have commenced stopping and backing at a distance of eight hundred yards from each other. This was their special duty under the circumstances. They both admit that no signal from the other was heard. To stop and back, and to commence to do this at eight hundred yards distance, was the specific duty of the moment. One, or both, certainly failed in performing this duty.

Two specific duties were incumbent upon the managers of

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the respective vessels: First, to signal at the required distance; and, second, on hearing no signal from the other, to commence stopping and backing at the required distance. Which of them neglected, or did both of them neglect, either of these duties?

I have carefully looked over all the material evidence in the case, and have read the elaborate briefs of the counsel, and am forced to the conclusion that there was negligence on both sides. It is apparent from the case that both vessels, after having approached within a distance of eight hundred yards of each other, continued to make headway, and that the collision occurred at an intermediate point not far from that which was due to an equal amount of headway on both sides. In other words, so far as I can gather from the evidence, they met about midway of the distance which separated them when the first signal was given. The place of meeting was lower down than the place where the Potomac alleges that she gave her signal, and was higher up than the place where the Lee alleges that she gave her signal, and the relative movements of position of the vessels respectively seem to have been about the same.

The evidence of negligence on the part of the Lee is quite clear. Leaving out the interested testimony of her officers, we have that of several passengers on board of her at the time, who all unite in saying that the captain was not on duty at the time, but was sitting in the social hall, engaged in conversation with the passengers, and that he never left the hall until the collision occurred, and that the Lee kept on her usual rate of speed; that no whistle was sounded; that the bells for reversing the wheels were not rung until the moment preceding the collision, and several of them state that the pilot, before leaving the wharf boat at Natchez, had been drinking with his friends to a considerable extent, and although they seem to speak on that subject with reluctance, they say enough to give the distinct impression that he had taken enough liquor to be somewhat under its influence.

Had the captain been at his post and on the lookout, there would have been a better chance of the Potomac's signal being heard on the Lee.

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On the other hand, laying aside the interested evidence of the officers of the Potomac, and looking to that of those who were free from any such bias, the weight of the evidence seems to be that she did not commence to stop and back until within a short distance of the point of collision—within, at least, the distance of four hundred yards of the Lee.

Mahlon Rush, one of the strikers on board the Potomac, states that he was in the texas hall and heard the engine bells ring to stop her, and then the two short whistles of the Potomac; he then ran out on the hurricane roof, and as he went out he heard Captain Schunk halloo to the other boat, "stop that boat." He says, "The Lee was about one hundred and fifty yards from us when I heard our bells ring to stop, and she had got within a hundred yards of us before our engines stopped."

He corrects this statement afterwards by saying that the boats were about three hundred yards apart, as near as he could judge, when he first went out on the roof. He afterwards says that "the two boats were three hundred yards apart when the engines were stopped, and about two hundred or two hundred and fifty when the starboard engine commenced backing;" and it is conceded that the larboard engine did not back at all. He says also that "both boats were headed quartering towards the Mississippi shore, right after the collision. John Fink, a passenger on the Potomac, says, "I was sitting by the stove in the hall, engaged in conversation, and about a minute before the collision took place, I heard the Potomac's stopping bell ring; right after that her signal blew; right after that her backing bells rung, and that frightened me, I jumped up and started to the door forward, and I met the bar-keeper coming in at the door, and says he, 'follow me; for God's sake do not go there;' I ran back after him, and about two-thirds of the way towards the stern, when I felt and heard the jar of the collision between the two boats."

It is evident from this testimony, and much more could be cited to the same effect, that the stopping and backing of the wheel, the giving of the signal by the whistle, and the col-

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lision, all followed one another in rapid succession, and that no sufficient interval of time between these successive events occurred to render it possible that the Potomac commenced the process of stopping and backing at a distance of eight hundred yards from the Lee, or anything like that distance.

I cannot review the evidence in detail. I can only say that after having carefully examined it, I am forced to the conclusion that there was some neglect, at least, on the part of the Potomac in reference to the duty of stopping and backing, and I am by no means satisfied that her signal was given by the whistle at the required distance from the approaching steamer.

The rules and regulations adopted for the government of pilots of steamers navigating the rivers flowing into the Gulf of Mexico, are explicit on the subject of the precautions to be observed when steamers are about to meet and pass each other.

(The justice here read the first and second rules, which require signals to be exchanged as soon as the vessels are within eight hundred yards of each other, indicating the side on which they will pass each other; and, if not exchanged and understood, requiring them to stop and back.)

These directions are so plain and easy to be observed, that no vessel should be regarded as without fault which fails substantially to follow them. In my judgment there was such a failure on both sides in this case, which caused this disaster.

I think there is stronger evidence of negligence on the part of the Lee than on the part of the Potomac. If I were permitted to gauge the demerit of the parties, I should be inclined to do so; but the law does not permit this to be done. If both parties are in fault, the damage is to be sustained by them equally.

As to the actual damage which was allowed on the one side and on the other, having examined the master's report and the decree, I see no reason for disturbing the result to which the district court came.

A question is made with regard to the allowance of profits to a damaged steamer whilst undergoing repairs. It is well

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settled by the decisions of the Supreme Court, and by the general practice in admiralty in this country, that demurrage forms a fair subject for the allowance of damage in such cases: *The Granite State*, 3 Wall., 310; *The Black Prince*, Lush., 568.

I think there is no error in the decree in this regard. The amount of damage allowed for the time the respective vessels were laid up, seems to have been reached in a proper manner. The average net earnings of the Lee for a certain period of time, embracing that of her detention for repairs caused by this collision, were taken as the basis of ascertaining the amount due to each trip, and the number of trips lost was a subject of very simple calculation. The value of the Potomac's time whilst she was laid up was based upon the evidence and declarations of those concerned in her, and was fixed at \$100 a day. From the evidence before the master, I am disposed to think that the allowances were correctly made.

I have more difficulty with regard to a charge made against the Lee for the insurance money which she received from her underwriters. That is ordinarily a matter with which her adversary, in a case of collision, has nothing to do, and it seems to me a little hard on the owners of the Lee that they should not be permitted to apply their insurance to that portion of their damage for which they have no redress against the other vessel.

The result of the decree is to give to the owners of the Potomac the benefit of the insurance money belonging to the Lee, by deducting it from the moiety of the damage sustained by the Lee, for which the Potomac was made liable, instead of deducting it from, or allowing it to go upon, the other moiety for which the owners of the Lee have no recourse against any person. Had the owners of the Potomac refunded this amount to the underwriters upon the claim of the latter to be subrogated to the rights of the Lee against the Potomac, it might have been different, but as I understand the evidence, the underwriters made no claim against the owners of the Potomac, but voluntarily released all

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demands against them, and assigned to them any supposable rights they may have had.

I am not satisfied that this transaction entitles the owners of the Potomac to have the amount of the insurance deducted from the moiety of the damage to the Lee, for which they were responsible.

In my judgment, therefore, the decree should be corrected in that respect, and the owners of the Potomac should be made liable to pay one-half of the damage sustained by the Lee, without any such deduction.

The decree will be drawn accordingly.

HAMILTON L. LEE V. JAMES M. THOMPSON ET AL.

1. It is according to the course and practice of courts of admiralty, where a libellant has obtained a judgment *in personam* against the respondent, to attach a debt due the latter from a third person to satisfy the decree.
2. A court of admiralty has power to decide between conflicting claims to property seized by attachment or on execution.
3. Where a party claims property attached by a court of admiralty to satisfy its judgment, and submits his claim to that court, he is bound by its decision.
4. Until the passage of the act of congress, approved Feb. 16, 1875, "to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes," a court of admiralty had strictly no power to try issues of fact by a jury; but it might, either on its own motion or at the instance of the parties, submit any question of fact to commissioners or referees for their opinion and advice. Their decision, however, would not, like the verdict of a jury, be conclusive of the facts, which would finally have to be submitted to the decision of the court.
5. In a case where the court of admiralty submitted issues of fact to a jury, and the record showed that the court was controlled by the findings of the jury, without consideration of the evidence; *held*, that the proceeding was irregular and illegal, and if the case were simply one to be affirmed or reversed, it would be reversed.
6. But where, notwithstanding such error, all the evidence is before the appellate court, that court will consider it and render such judgment as the evidence warrants.

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The libelant having obtained a judgment *in personam* against the respondents, issued an execution thereon, which was returned that no property could be found.

Thereupon the libelant filed a supplementary petition or libel, alleging that Edward Conery and J. H. Menge were indebted to the respondent Thompson on bond for more than the amount due on the judgment, and praying an attachment of so much of said debt as would satisfy the judgment. Conery and Menge being cited to answer this allegation, admitted their indebtedness to Thompson, which had been converted into judgment; but alleged that Thompson had transferred the judgment to Doctor Vincent Boagni, and that they had been duly notified of the transfer.

The libelant traversed the assignment, averring that it was simulated, fraudulent and void. Whereupon Conery and Menge, alleging that they were not interested in this question, but were mere stakeholders, prayed that Boagni might be cited to appear and defend his interest.

An order for that purpose was made by the court, and Boagni appearing, set forth the act of assignment, alleged its *bona fides*, but excepted to this mode of proceeding, to try the validity of his title, insisting that the proceeding should be a direct action where he would have a right to a trial by jury.

The court then made an order that the matter be tried by a jury, and it was tried accordingly; and the jury rendered a verdict that the transfer from Thompson to Boagni was a simulated transfer.

Judgment was thereupon rendered that the libelant recover the amount of his judgment against Conery and Menge. From this judgment Boagni has appealed.

Mr. Thomas Hunton, for libelant.

Mr. B. Egan, for respondent.

BRADLEY, Circuit Justice. I. The first question on the appeal is, whether the district court had power to attach the debt due from Conery and Menge to Thompson in satisfaction of the judgment.

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By the process act of 1792, section 2 (1 Stat., 276), the forms of writs, executions and other process, and the forms and modes of proceeding in suits at common law, were required to be the same as then used in the state courts, and in suits in equity and admiralty according to the principles, rules and usages which belong to courts of equity and admiralty respectively; but subject to such alterations and additions as the said courts should deem expedient, or to such regulations as the Supreme Court of the United States should think proper from time to time by rule to prescribe to any circuit or district court concerning the same. The Supreme Court did not adopt any general rules on the subject until long afterwards, and the practice in admiralty, including the forms of writs and executions was that which prevailed in the states respectively at the time of the adoption of the constitution, as modified and regulated from time to time, by the district courts respectively: 10 Wheat., 489, 490. In 1828, congress passed an act further to regulate process, but it was not extended to courts established in Louisiana.

In 1842, congress passed a further act on the subject (5 Stat., 516), by the 6th section of which plenary power was given to the Supreme Court to prescribe and regulate the forms of writs and other process to be used and issued in the district and circuit courts, and the forms and modes of framing and filing libels, bills, answers and other proceedings and pleadings, in suits at common law, or in admiralty and in equity, etc., and generally to regulate the whole practice of those courts.

Under the authority given by this act the Supreme Court soon afterwards promulgated general rules for the practice in admiralty proceedings, which are still in force so far as not modified by subsequent legislation or amendment.

By the 21st of these rules it was declared, that on decrees for the payment of money, the libellant might, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in nature of a *capias*, or a *fiery facias* against goods and chattels, and for want thereof he might arrest the person.

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After the abolition of imprisonment for debt this rule was amended and now declares that, in all cases of a final decree for the payment of money, the libellant shall have a writ of execution in the nature of a *feri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulators.

This must be regarded as the paramount law regulating the subject of executions on judgments in admiralty for the payment of money. It is true the act of 1872 (17 Stat., 196) relating to the practice of the courts (which has been generally incorporated into the Revised Statutes), requires that the practice, pleadings and forms and modes of proceeding in the circuit and district courts, in all civil causes, other than equity and admiralty causes, shall conform to those of the state courts respectively, including the remedies for reaching the property of the debtor upon or supplementary to execution.

But the forms of mesne process and the forms and modes of proceeding in the circuit and district courts in equity and admiralty, are still to be conformed to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except as expressly modified by statute or by rules of court made in pursuance thereof, subject, however, to alteration and addition by the said courts, and to regulation by the Supreme Court; the paramount authority of the latter court being still continued. (See Revised Stat. U. S., sections 913-918.)

Assuming it to be true, therefore, that the process of execution to be issued on money judgments in the admiralty, according to rule xxi, is to be a writ in the nature of a *feri facias*, leviable upon the goods and chattels, lands and tenements or other real estate of the defendant or stipulators, the question remains as to the manner in which such writ is to be executed, and as to the course to be pursued for obtaining satisfaction of the judgment in cases where the writ is ineffective for want of leviable property. Is there anything in the statutes, or in the rules of the Supreme Court, which would prevent the district court from exercising its power to reach

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rights and credits of the defendant within its jurisdiction in a state where that species of property may be thus pursued in its own courts? Is there anything to prevent the district court itself from adopting, in this regard, the practice of the state courts?

The power of the court to reach the rights and credits of the respondent in certain cases is unquestionable. By the second rule in admiralty, the court is authorized in suits *in personam*, to issue a warrant to arrest the person of the defendant, with a clause therein, if he cannot be found, to attach his goods and chattels; or, if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of garnishees named therein; and of course the property so attached may, in default of appearance, be sold to satisfy the debt. This is in strict accordance with the ancient course in admiralty proceedings, and has been confirmed by the decisions of the Supreme Court. (See *Manro v. Almeida*, 10 Wheat., 473; *Atkins v. The Disintegrating Co.*, 18 Wall., 303; and Rule 37 in Admiralty.)

This shows that the power of the court is competent to reach this species of property (rights and credits) and to apply it in satisfaction of the libellant's demand.

Ordinarily, the respondent, on appearing, is compelled to give sufficient security by stipulators for the payment of the judgment. But where this is not done, and he remains in contumacy, and no corporeal property can be found to answer the execution, there seems to be no good reason why the court should not have power by a supplementary proceeding to cause his rights and credits to be seized by attachment or garnishment, where property of that kind is subjected to the payment of debts by the local law.

In Louisiana, rights and credits, as well as corporeal movables, are liable to seizure on *fiери facias*. Such effects, therefore, are subjected to execution in ordinary cases at law, in the circuit and district courts of the United States. So that the proceedings instituted in this case for reaching this species of property are neither strange nor unusual, nor contrary to the customs and usages of the district, but entirely in har-

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mony therewith. A rule of the district court of long standing (rule 42) directs that on judgments in admiralty *in personam*, a writ of execution may issue against the property of the judgment debtor in the same manner as in ordinary civil cases. This rule is in entire harmony with the rule 21 in admiralty, and would probably authorize a seizure of rights and credits under the writ of *feri facias* itself. But the course adopted in this case, of garnisheeing the debtors of the defendant and citing them to answer interrogatories as to their indebtedness, instead of proceeding directly under the *feri facias*, cannot be complained of. It was more in accordance with the modes of proceeding proper to the district court, as a court of admiralty, and was more favorable to the garnishees than a direct seizure would have been.

I think there was no error in attaching the debt in question for the purpose of procuring satisfaction of the libellant's judgment.

II. The next subject to be considered is, the trial of the validity of the transfer from Thompson to Boagni of the claim against Conery, Menge and others. A regular transfer was produced, which, under the laws of Louisiana, conveyed and transferred to Boagni all the right, title and interest of Thompson. The libellant alleged that this was a simulated transfer. Boagni, as has been shown, being cited to sustain it, alleged it to be *bona fide* and for good consideration, and excepted to its validity being tried in a proceeding in which he could not have a trial by jury. A jury was ordered, and the trial went on between the libellant and Boagni, and a verdict was given that the transfer was a simulated one.

Now, first, had the district court, sitting in admiralty, power to try this question? Secondly, if it had, was the mode of trial valid and lawful, so as to bind Boagni? The only direct mode of attacking the *bona fides* of such a transfer in states where the common law prevails would have been by bill in equity to set it aside as being simulated and fraudulent; in Louisiana, by the revocatory action. But the plaintiff in a judgment, when he finds or believes that his debtor has made a simulated transfer of his property, may

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treat it as null and no transfer; and require the property to be seized, and leave it to the transferee to take such course as he sees fit to vindicate his right. It is so laid down in Henner's Digest, title, Execution, v (a), 3, e (vol. 1, p. 619), as the result of the authorities, which are there referred to, but which I shall not take up time to quote. When the seizure is made, the party affected thereby and claiming the property may intervene or not, as he sees fit. That this is the Louisiana law may be seen by a reference to the same Digest, title, Pleading, viii (d), (2), vol. 2, p. 1179. If he does intervene, of course he is bound by the decision.

Now, although a court of admiralty has no power, by a direct and independent proceeding, to investigate the validity of a man's title to his property, except in petitory suits relating to the title or right of possession of ships or other maritime subjects; yet, as incidental to its general jurisdiction, and for maintaining the same, it has plenary power to decide, and frequently does decide, conflicting claims to property. Without such power its jurisdiction would often be defeated.

In all cases of libels *in rem*, when a party appears as claimant, the libellant may contest the truth and validity of his claim. Judge Conkling, in his Treatise on Admiralty, correctly says: "The libellant has a right, by a suitable exceptive allegation, to contest the proprietary interest of the claimant, and to have it formally decided." (Vol. 2, p. 205.)

The power of the court to entertain such contestations upon all seizures made under its authority would seem to be indispensable. It is as necessary that it should have power to decide between conflicting claims to property seized by attachment or on execution as in seizures upon libels *in rem*. In Benedict's Admiralty, sec. 459, it is said: "If the property of a third person be attached, he may intervene by claim, for the protection of his property." It seems to me that the proposition can hardly be questioned. Without power to try the validity of conflicting claims, the court could not enforce its judgments for the payment of money. They could always be defeated by fraudulent and simulated transfers. If a third party comes in to claim the property

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which has been seized, he must submit himself to the jurisdiction of the court. If he does not choose to do this, either voluntarily or upon citation, he must, at his own risk, seek such other remedy as the law may afford him. Perhaps he might sue the marshal for damages, or where a credit is seized, as in this case, perhaps he might test his claim by further legal proceedings against the garnishees. Whatever remedy he may have when he absolutely declines the jurisdiction of the district court, he loses it by submitting to that jurisdiction. In this case Boagni, although he excepted to the proceeding, nevertheless, after he was allowed a trial by jury, he submitted to it, and went before the jury in litigation of his right. Having failed, however, he now insists that the trial by jury was an illegal mode of trial in the admiralty court, and an unauthorized proceeding.

It is undoubtedly true that a court of admiralty has no power to try causes by jury; but there is no reason why it should not, either on its own motion or at the desire of the parties, submit any question of fact to commissioners, or referees, for their opinion and advice, and the number of these commissioners may be twelve as well as any other number. But their decision, after all, is not like the verdict of a jury, conclusive upon the facts; and no bill of exceptions can be entertained, and no writ of error can be brought to consider such exceptions. The matter must be finally submitted to the judgment of the court, and the court will not be concluded by the verdict, although it may be aided in coming to a conclusion. A state of things precisely similar to this took place in the case of *Dunphy v. Kleinsmith*, reported in 11 Wallace, 610. There a creditor's bill was filed in a territorial court to set aside a fraudulent assignment made by the debtor, and an issue was made for trial by a jury. The trial was had and a verdict given, and the court gave judgment upon the verdict, as it would have done in an ordinary jury trial at law, without looking at the evidence or passing upon the facts of the case. The Supreme Court held that this was not a legal mode of proceeding, and reversed the decree.

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I should infer from the record in this case that a similar course was pursued, and if it were simply a case to be affirmed or reversed, I should feel compelled to send it back for reconsideration. For whilst the district court might very properly have given much consideration and weight to the finding of the jury, it was bound to come to a conclusion of its own on the facts, and to disregard the verdict if, in its opinion, it was not supported by the evidence.

But as, upon this appeal, all the evidence, as the parties have conceded, is contained in the record, and as the case is before this court for retrial, it can do what the district court should have done, if it did not.

Accordingly, I have attentively read the evidence, and whilst Thompson and Boagni both swear that the assignment was made for the consideration of an indebtedness which Thompson had assumed to pay to Boagni on behalf of one Mrs. McHusbands, in 1866 or 1867, and was absolute and unconditional, it appears from the evidence of Boagni that this debt of Mrs. McHusbands was secured by a note with a mortgage, and the property mortgaged not being supposed to be of sufficient value to protect him (Boagni), Thompson secured him still further by the transfer of the claim in question. These statements are inconsistent with each other. An absolute and unconditional transfer is very different from a transfer by way of collateral security.

Then there are other circumstances that are calculated to raise a doubt in the mind with regard to the *bona fides* of the transaction.

Both parties say that a former transfer had been made, but when wanted no record of it could be found; and, therefore, a second act of transfer was passed on the 5th of May, 1875, and still another on the 15th of May, 1875. The last act recites that the first transfer had been made several years before.

Why were so many successive transfers needed or required? What happened in 1875 that made the transfer to be wanted? The record discloses the fact that the claim, which was a proceeding against the steamboat Great Republic, was about

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passing into judgment, and the further fact that Thompson informed Boagni that there was a judgment against him in New Orleans, and that he thought the judgment of Thompson against the Great Republic might be garnisheed. Does it not seem most probable that the act of assignment was wanted for the purpose of defeating any such garnishment, especially as Thompson had declared that he owed the libellant nothing, and that if he got a judgment it would be by false swearing.

It is to be observed also that no explanation is given of the manner in which, or reason why, Thompson assumed the debt of Mrs. McHusbands, in 1866 or 1867; and Thompson declined to answer the fifth direct interrogatory, inquiring whether he knew or could set forth any other matter or thing which would be of advantage or benefit to the parties at issue, or material to the subject or to the matters in question; and also refused to answer the eleventh cross-interrogatory, which inquired whether he had any property either in his own name or that of other persons; and Boagni also made no answer to the said fifth interrogatory.

It is further to be observed that Boagni never took any care of or gave any attention to the suit against the Great Republic, but gave power to Thompson to attend thereto, who still managed and looked after it with the same interest and attention as if he were the proprietor.

Putting all these circumstances together, and others which the evidence discloses, it does not seem at all strange that the jury should have come to the conclusion they did, and I am unable to say that it was not supported by the evidence; and as this was the tribunal before which Boagni desired to go, I do not feel disposed to question the justice of the verdict.

On the whole matter, it seems to me that the decree of the district court should be affirmed.

Bertonneau v. The Directors of City Schools.

NOVEMBER TERM, 1878.

ARNOLD BERTONNEAU v. THE BOARD OF DIRECTORS OF
CITY SCHOOLS ET AL.

1. Where the officers of a city or state provide public schools of equal excellence for all children between certain ages, but do not allow children of colored parents to attend the same schools with children of white parents: *Held*, that the rights of the former under the constitution and laws of the United States were not thereby impaired.
2. The federal courts have no jurisdiction, irrespective of the citizenship of the parties, of suits respecting violations of a state law or constitution by the officers of a state, which do not impair rights granted or secured by the constitution or laws of the United States.

IN EQUITY. Heard on demurrer to the bill.

The bill was filed against the board of directors of city schools of the city of New Orleans, a corporation created by the state of Louisiana, Wm. O. Rogers, chief superintendent of the public schools of New Orleans, and George H. Gordon, principal teacher of the school known as the Fillmore school, in the third district of the city of New Orleans.

The complainant and all the defendants were alleged to be citizens of the state of Louisiana.

The bill averred in substance that the complainant was a person of African descent, the father of two legitimate male children, aged respectively nine and seven years; that he resided with his children at No. 367 North Rampart street, in the city of New Orleans, and was a property holder and tax payer in said city; that the nearest public school to complainant's place of residence was on Bagatelle street, in the third district, distant about three blocks; that about November 13, 1877, complainant applied to defendant Gordon, the principal teacher of said school, to admit the complainant's said children as pupils therein, which he declined to do on the ground that they were of

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African descent, and alleging that his instructions from defendant William O. Rogers, chief superintendent of public schools, forbade him to receive children of African descent into said schools; that on July 3, 1877, the defendants, "the board of directors of city schools," adopted and published a preamble and resolution in the following words:

"WHEREAS, This board, in the performance of its paramount duty, which is to give the best education possible within the means at its disposal, to the whole population, without regard to race, color or previous condition, is assured that this end can be best attained by educating the different races in separate schools; therefore,

"*Resolved*, That the committee on teachers, aided and assisted by the superintendent, be authorized and instructed to take such steps during vacation as may be necessary to carry this object into effect."

The bill claimed that this preamble and resolution were in violation of the second clause of section 1 of article 14 of the amendments to the constitution of the United States, which declares "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, * * nor deny to any person within its jurisdiction the equal protection of the laws," and of that provision of the statutes of the United States which declares that "any person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects to, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress:" (Revised Statutes, section 1979.)

The bill further charged that the said preamble and resolution were in violation of article 135 of the constitution of the state of Louisiana, which declares, "The general assembly shall establish at least one free public school in each parish throughout the state, and shall provide for its support by taxation or otherwise. All the children of this state between

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the ages of six and twenty-one shall be admitted to the public schools or other institutions of learning sustained or established by the state in common, without distinction of race, color or previous condition. There shall be no separate schools or institutions of learning established exclusively for any race by the state of Louisiana."

The bill further charged that said action of the board of directors of the city schools, and of the other defendants, subjected the complainant to the deprivation of his right as a citizen of the United States and of the state of Louisiana, of having his children schooled and educated in and at said public school, which was established and sustained by the state of Louisiana, and in which schoolable children of white parents were admitted and educated, and degraded him and his family by the denial of their equality in the public schools with children of other citizens of the state.

The prayer of the bill was for a decree declaring the preamble and resolution above recited, and the actings and doings of said defendants above set forth, to be in violation of the constitution and laws of the United States, and that said defendants be enjoined and prohibited from enforcing said preamble and resolution, or any other ordinance to the same effect, and that defendants be required to admit the said children of complainant to said public school, or any other public school sustained or established by and under the constitution and laws of the state of Louisiana, as pupils, to be educated therein just as the children of white parents are admitted and educated therein.

To this bill the defendants filed a demurrer, on the ground that it contained no matter of equity whereof the court could take jurisdiction under the constitution and laws of the United States, or whereon the court could ground any decree or give complainant any relief against the defendants.

Mr. John Ray, for complainant.

Mr. Edgar Farrar, assistant city attorney, for defendants.

WOODS, Circuit Judge. There is no complaint in the bill that complainant's children are excluded from the public schools

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of the state on account of their race and color or for any other reason. Nor is there any averment that the public schools which are open to complainant's children are in any respect whatever inferior to the schools where the children of the white race are educated.

The grievance, and the sole grievance, set out in the bill is that complainant's children, being of African descent, are not allowed to attend the same public schools as those in which children of white parents are educated.

Is this a deprivation of a right granted by the constitution of the United States? The complainant says that the action of the defendants deprives him and his children of the equal protection of the laws, and therefore impairs a right granted to him and them by the fourteenth amendment to the constitution of the United States, and the act of congress passed to secure the same.

Is there any denial of equal rights in the resolution of the board of directors of the city schools, or in the action of the subordinate officers of the schools, as set out in the bill? Both races are treated precisely alike. White children and colored children are compelled to attend different schools. That is all. The state, while conceding equal privileges and advantages to both races, has the right to manage its schools in the manner which, in its judgment, will best promote the interest of all.

The state may be of opinion that it is better to educate the sexes separately, and therefore establishes schools in which the children of different sexes are educated apart. By such a policy can it be said that the equal rights of either sex are invaded? Equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age in the same school. Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the constitution of the United States. Equality of rights does not necessarily imply identity of rights.

These views have been held by the Supreme Court of Ohio, in respect to a law under which colored children were

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not admitted as a matter of right into the schools for white children.

State v. McCann et al., 21 Ohio State, 198. See, also, *State v. Duffy*, 7 Nev., 342, where substantially the same doctrine is held. See, also, the concurring opinion of Mr. Justice Clifford, in *Hall v. De Cuir*, 95 U. S., 485.

In the state of Georgia there is a law forbidding the intermarriage of white persons and persons of African descent.

It was held by Judge Erskine, of the United States Court, that this law was not obnoxious to the fourteenth amendment to the constitution.

Ex rel. Hobbs & Johnson, 1 Woods, 537.

The argument in support of this decision is that the law applies with equal force to persons of both races. Its prohibition applies alike to black and white, and the penalty for disobedience falls with equal severity on both.

These authorities, it seems to me, fully sustain the views above announced by this court.

But complainant contends that by the constitution of the state of Louisiana separate schools for white and colored children are prohibited, that the actings and doings of defendants set out in the bill are in violation of the plaintiff's right under the constitution of the state, and is a denial to plaintiff of the equal protection of the laws of the state, and that the board of the city schools and the other defendants in the bill, in this matter represent the state; that their acts are the acts of the state, and, consequently, that the clause of the fourteenth amendment to the constitution of the United States, which declares "No state shall deny to any person within its jurisdiction the equal protection of the laws," applies to this case.

Whether the board of directors of city schools, Rogers, the chief superintendent of schools, and Gordon, the principal of the Fillmore school, are the state of Louisiana, or represent the state of Louisiana, so that their acts are to be considered the acts of the state, it is unnecessary now to decide. Conceding for the present that their acts are the acts of the state,

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does it follow that this court can take cognizance of their doings, under that clause of the constitution relied on?

If I am not in error in holding that the requiring of white and colored children to attend separate schools, even when such schools are supported at the public cost, does not deprive either class of their equal rights, it would follow that as between citizens of the same state this court has no jurisdiction of the case presented by the bill.

If I am right in the view presented the claim of complainant amounts to this, that this court, without regard to the citizenship of the parties, has authority to inquire into every violation of a state law or state constitution by the officers of the state.

This court does not sit to supervise the conduct of state officers unless it impairs some right granted by the constitution of the United States, or unless the citizenship of the parties to the suit gives the court jurisdiction. Generally we are authorized to enforce or administer the state laws only when there is a controversy between citizens of different states.

As the bill does not present the case of an impairment of a right granted by the constitution of the United States, and as all the parties to it are citizens of the state of Louisiana it does not disclose any case of which this court can take jurisdiction. The demurrer must therefore be maintained.

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1. Where a creditor receives, in satisfaction of his debt, the note of or a draft upon a third person, it is a novation of the debt, which is thereby extinguished, with all its accessory rights and privileges.
2. The owner of a steamboat in process of construction drew drafts in favor of the builder upon a third person, who accepted them. The builder received the drafts in payment and receipted his account for work and materials; the drafts were renewed and the renewed drafts protested for non-payment, but no steps were taken to charge the indorser. *Held*, that the debt for work and materials was novated.

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3. A lien given by the local law of Kentucky upon a steamboat for work and materials furnished in that state for her construction will be postponed by a United States court sitting in Louisiana, to a subsequent mortgage, duly recorded according to the act of congress, in New Orleans, where she was registered and enrolled, and which was her home port at the date of the mortgage and of its registration.

ADMIRALTY APPEAL. The steamboat Katie was built by one J. M. White, her owner, at Louisville, Kentucky, in the year 1870. After she was launched, John B. Davis performed labor and furnished materials in equipping the boat with boilers, engine, etc. His bill amounted to somewhat more than \$50,000. His contract with White was that he was to be paid mainly in cash and the residue in drafts on one J. Pinckney Smith, of New Orleans.

After the work was done by Davis, he received drafts on Smith, which Smith accepted, for the balance due on his account for labor and materials, and receipted the account in full. The drafts were not paid at maturity, but were renewed. On March 7, 1872, White sold the Katie to one Miles Owen, who substituted his own drafts on J. Pinckney Smith for a portion of those drawn by White and held by Davis. These and the renewed drafts still held by Davis were not paid at maturity. They were protested for non-payment, but no notice of demand and non-payment was given, so far as appeared to the drawers. At the time that Davis furnished the materials for and performed the work above spoken of, on the Katie, the laws of Kentucky gave mechanics and others a lien on steamboats, etc., for work and materials done or furnished towards the building and equipping of such steamboats within the state of Kentucky, "with a preference or priority over any other debt of the owner except to the officers and hands, and over all other liens thereafter contracted."

Before the steamer was sold to Miles Owen she was enrolled in the office of the collector of customs for the port of New Orleans, and New Orleans continued to be her home port until her sale by the order of the court of admiralty.

On August 29, 1872, Miles Owen, who was then the owner

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of the Katie, acknowledged by writing of that date his indebtedness to a large number of firms and individuals for supplies, etc., furnished his boat, and promised said creditors to pay them the sums due them respectively, and to secure such payment, he executed a mortgage on the Katie which, on August 30, 1872, was filed for record in the office of the collector of customs for the port of New Orleans, where it was soon after recorded.

On November 29, 1872, the Katie was libeled in the district court for salvage. On January 11, 1873, she was sold by the order of the district court and brought, after the payment of costs and general admiralty liens, the sum of \$20,922.86.

John B. Davis, on April 10, 1876, and June 10, 1876, filed interventions asking that his debt for work and materials which he alleged was represented by the drafts above mentioned, might be paid out of said proceeds, and claiming to have a lien by the law of Kentucky therefor on said proceeds.

On April 13 the mortgage creditors named in the mortgage of August 29, 1872, filed their petition claiming that their mortgage was the only lien on the proceeds of said steamboat, and praying that said proceeds might be applied to the payment of their claims, secured by said mortgage.

The district court, after hearing the evidence submitted by these conflicting interveners, dismissed the interventions of Davis, and decreed that the proceeds of the sale belonged to the mortgage creditors.

From this decree Davis appealed to this court.

Mr. Thomas Hunton, for John B. Davis.

Messrs. Charles B. Singleton, R. H. Browne and B. Egan, for Wilson, Fagan & Co., and other mortgage creditors.

WOODS, Circuit Judge. A consideration of the evidence in this case satisfies me that the debt due to Davis for his work done and materials furnished for the Katie was novated by the taking of the drafts of White on J. Pinckney Smith.

The only parties to the contract for furnishing engine and

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boiler for the boat were J. M. White, her owner, and J. B. Davis. Davis was not examined, but White, who was, testified distinctly and repeatedly that the drafts drawn by him on J. Pinckney Smith were received by Davis in payment and settlement of the balance due Davis, and that their contract was that such balance was to be paid in that way. All the circumstances corroborate this view. Davis acknowledged payment of his account against White for labor and materials by receipting it in full. The drafts on Smith were all renewed at least once, and afterwards Davis received the drafts of Miles Owen on Smith in substitution for a large portion of the drafts of White. All these drafts were protested for non-payment, but no steps were taken to charge White, the drawer, and no claim of a lien upon the proceeds of the sale of the Katie was ever made by Davis until April 10, 1876, more than three years after her sale.

It is true that J. Pinckney Smith testifies that the debt due to Davis was not to be considered as paid until the drafts were paid. But the weight of the evidence is decidedly in favor of the proposition that the taking of the drafts by Davis was intended both by him and White to be a novation of the debt—that Davis intended that his account should be settled and paid by the drafts.

When a creditor receives in satisfaction of his debt the note of or a draft upon a third person, it is a novation of the debt, which is thereby extinguished with all its accessory rights and privileges: *Hunt v. Boyd*, 2 La., 109; *Walton v. Bemiss*, 16 La., 140; *Cammack v. Griffin*, 2 La. An., 175; *White v. McDowell*, 4 La. An., 543; *Wallace v. Agry*, 4 Mason, 336; *Maneely v. McGee*, 6 Mass., 143; *Watkins v. Hill*, 8 Pick., 522.

It follows, if my view of the facts is correct, that Davis has no lien against the proceeds of the sale of the Katie.

But, conceding that there was no novation of the debt and that Davis had a lien by the law of Kentucky for the work and materials supplied by him in that state in the construction of the Katie, the question still remains whether that lien is to take rank in the distribution of the proceeds of the sale

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by this court, sitting in Louisiana and administering the laws of this state and of the United States, over a subsequent mortgage of the steamboat executed at this port, where the boat was registered, and enrolled and recorded according to the act of congress.

If Davis had any lien on the Katie, it was by virtue of the local law of the state of Kentucky: *The Lottawanna*, 21 Wall., 558; *The Edith*, 94 U. S., 519.

Generally speaking, the courts of one country recognized the existence and validity of liens created by the law of foreign countries, but according to Mr. Justice Story this is not to be confounded with the giving them a superiority or priority over all other liens and rights justly acquired in the country where the court sits under its own laws: Conflict of Laws, sec. 323.

In *Harrison v. Sterry*, 5 Cranch, 289, Chief Justice Marshall says: "The words of the act of congress which entitle the United States to a preference do not restrain that privilege to contracts made within the United States or with American citizens. To authorize this court to impose that limitation on them, there must be some principle in the nature of the case which requires it. The court can discern no such principle; the law of the place where a contract is made is, generally speaking, the law of the contract; that is it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the court sits, which is to decide the case."

Under the law of this state the debt of Davis has no lien upon the Katie, because here registration is necessary to the validity of a lien.

In the case of *Lee v. His Creditors*, 2 La. An., 599, the Supreme Court of this state held that privileges established by the laws of another state for work and labor furnished for the construction of a steamboat form no part of the contract itself, and cannot follow the property into this state, when no such privilege exists here.

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And in the later case of *Swasey v. The Montgomery*, 12 La. An., 800, the same court refused to recognize a lien upon a steamer given for tolls by the law of Alabama.

Without going so far as these decisions and denying Davis any lien whatever, I think it clear that the lien granted to him by the local law of Kentucky should not in this forum be allowed to override a lien authorized by a law of the United States, and perfected according to that law, over property situate within the jurisdiction of this court. I should feel bound to respect his lien, but I should also feel bound to postpone it to the lien of the mortgage creditors, under the facts of this case.

The result is that the proceeds of the sale must be first applied to the payment of the claims of the mortgagees, and as the proceeds will be largely insufficient to pay those claims the intervention of Davis must be dismissed.

THE UNITED STATES v. J. CARNEAL GOLDMAN ET AL.

1. An indictment based on section 5520 of the U. S. Revised Statutes for conspiracy to prevent by force, etc., a citizen lawfully authorized to vote from giving his support and advocacy in a legal manner in favor of the election of a lawfully qualified person as a member of congress, need not set out the acts of advocacy and support which the conspiracy was formed to prevent.
2. The jurisdiction of a court of the United States to try persons accused of conspiracy under said section, is not ousted by the fact that the indictment charges that in carrying out their design the conspirators were guilty of a crime of which the state courts had exclusive jurisdiction, even though such crime were of higher grade than the conspiracy charged.
3. Section 2 of article 1 of the constitution of the United States, confers upon the electors in each state, who have the qualifications requisite for electors of the most numerous branch of the state legislature, the right to vote for representatives in congress, and congress has the constitutional power to protect that right.
4. Power is conferred on congress, by section 4 of article 1 of the constitution, to regulate the time, place and manner of holding elections for representatives in congress. This includes the power to protect

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the electors in a free interchange of views, in making a free choice, and in expressing that choice freely at the ballot-box.

5. Congress had constitutional power to enact section 5520 of the Revised Statutes.

Before Woods and BILLINGS, JJ.

Heard on demurrer to indictment.

The indictment was based on section 5520 of the Revised Statutes, which declares: "If two or more persons in any state or territory conspire to prevent by force, intimidation or threat any citizen who is lawfully entitled to vote from giving his support or advocacy in a legal manner toward or in favor of the election of any lawfully qualified person as an elector for president or vice-president of the United States, or as a member of the congress of the United States, or to injure any citizen in person or property on account of such support or advocacy, each of such persons shall be punished by a fine of not less than \$500 nor more than \$5,000, or by imprisonment with or without hard labor not less than six months nor more than six years, or by both such fine and imprisonment."

The indictment consisted of three counts. The first charged that Goldman and the other defendants, on October 12, 1878, at the parish of Tensas, "did conspire together, and with others, to the grand jurors unknown, to prevent by force, intimidation and threats Fleming Branch, Daniel Canada, Willie Singleton and others, whose names are to the grand jurors unknown, from then and there giving their support and advocacy in a legal manner towards the election of one J. W. Fairfax, a lawfully qualified person, as a member of the congress of the United States from the fifth congressional district of the state of Louisiana, they the said Fleming Branch, Daniel Canada, Willie Singleton and others aforesaid, each and every one of them then and there being citizens of the United States and of the said state of Louisiana, duly and properly registered under the laws of Louisiana and lawfully entitled to vote."

"That for the purpose of effecting the object of the said conspiracy by force, intimidation and threats, as aforesaid,"

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the said Goldman and others therein named, "did on the said 12th day of October, A. D. 1878, at and in the said parish of Tensas and state of Louisiana, assault and shoot and inflict great bodily injury upon the said Fleming Branch, Daniel Canada, Willie Singleton and others, as aforesaid, and upon each and every one of them, contrary to the form of the statute," etc.

The second count charged that the defendants and others did feloniously conspire, at the same time and place stated in the first count, "to prevent by force, intimidation and threats certain citizens of the United States, and of the said state of Louisiana, residing in the parish of Tensas, in said state, and in the fifth congressional district thereof, to wit, Fleming Branch, Daniel Canada, Willie Singleton and others, whose names are to the grand jurors unknown, from giving their support and advocacy in a legal manner, to wit, by convoking and holding public meetings; by the delivery of public addresses; by the organization of political clubs and societies, and by other similar and lawful means towards and in favor of the election at a general election thereafter, to wit, on the first Tuesday after the first Monday in the month of November then ensuing, to be held under the laws of the state of Louisiana, in the said parish of Tensas, and at which said election a member of the congress of the United States for the said fifth congressional district of the state of Louisiana was to be voted for and elected, of one J. W. Fairfax, a person then and there lawfully qualified, as a member of the congress of the United States for the said fifth congressional district of Louisiana, they, the said Fleming Branch, Daniel Canada, Willie Singleton and others aforesaid, and each and every one of them then and there being lawfully entitled to vote at the general election so then about to be held as aforesaid." The second count avers the overt acts of the defendants in carrying out said alleged conspiracy in the same words substantially as the first, and concludes "contrary to the form of the statute," etc.

The third count charged that the defendants did feloniously conspire among themselves, and each with the other, to injure

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Fleming Branch, Daniel Canada, Willie Singleton and others, to the grand jurors unknown, citizens of the United States, and of said parish of Tensas and state of Louisiana, and legally qualified voters, in their person and property, on account of the support and advocacy by them, the said Branch, Canada, Singeton and others aforesaid, then and there given in a legal manner, to wit, by convoking and holding public meetings; by the delivery of public addresses, and by the organization of political clubs and by other similar and lawful means towards and in favor of the election of a lawfully qualified person, to wit, one J. W. Fairfax, as a member of the congress of the United States for the fifth congressional district of the state of Louisiana, at a general election to be held, to wit, on the first Tuesday after the first Monday in November, A. D. 1878, according to the laws of the state of Louisiana, etc. This count then alleged the overt acts committed by the defendants in carrying out said conspiracy, in substantially the same terms as the first and second counts, and concluded "contrary to the form of the statutes," etc.

The defendants filed demurrers to each of the three counts on substantially the same grounds.

The grounds pressed upon the attention of the court were :

1. That the counts were defective in not specifying the time, place and circumstances of the acts of advocacy and support of the election of said Fairfax as a member of congress by said Branch and others.

2. It was objected that in the execution of the conspiracy it was alleged that the conspirators shot the parties against whom the conspiracy was formed, and therefore the allegations as to the overt acts showed a merger of the lesser crime in the greater, and thus the indictment on its face showed a want of jurisdiction in this court.

3. It was objected that the act of congress on which the indictment is based was unconstitutional.

Mr. A. H. Leonard, United States attorney, for the United States.

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Messrs. T. J. Semmes, W. F. Mellen and Julius Aroni,
for defendants.

WOODS, Circuit Judge. We shall notice the objections to the indictment in the order above stated.

1. With respect to the statements of the charge in an indictment for conspiracy, it may be observed that though it is usual to state the conspiracy, and then show that in pursuance of it certain overt acts were done, it is sufficient to state the conspiracy alone. And it is not necessary to state the means by which the object was to be effected, as the conspiracy may be complete before the means to be used are taken into consideration: *Rex v. Best*, 2 Lord Raym., 1167; 3 Chit. Crim. Law, 1143.

This is the rule at common law when the conspiracy is to commit some offense known to the law. It is only when the conspiracy is to commit some act not an offense that the indictment must show some illegal act done in pursuance of the conspiracy: *Rex v. Seward*, 1 Adolph. & E., 706.

Thus, where an indictment charged that the defendants conspired together, by indirect means, to prevent one H. B. from exercising the trade of a tailor, and it was contended that it should have stated the fact on which the conspiracy was founded, the means used for the purpose, Lord Mansfield, C. J., said: "The conspiracy is stated and its object; it is not necessary that any means should be stated." And Buller, J., said: "If there be any objection, it is that the indictment states too much; it would have been good, certainly, if it had not added, 'by indirect means,' and that will not make it bad." Note to *Rex v. Turner*, 13 East., 231.

When the indictment charged that the defendant conspired by divers false pretenses and subtle means and devices to obtain from A divers large sums of money, and to cheat and defraud him thereof, it was held that, the gist of the offense being the conspiracy, it was quite sufficient to state the fact and its object, and not necessary to set out the specific pretenses. Bailey, J., said: "When the parties had once agreed to cheat a particular person of his moneys,

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although they might not then have fixed on any means for that purpose, the offense of conspiracy was complete:" *Rex v. Gill*, 2 B. and Ald., 204; *The State v. Bartlett*, 30 Maine, 132.

But when the act only becomes illegal from the means used to effect it, the illegality of it should be explained by proper statements: *Commonwealth v. Hunt*, 4 Metcalf, 111.

These rules of pleading throw light upon the first objection made to the indictment.

The first and second counts of the indictment charge a conspiracy to prevent certain qualified voters from giving their support and advocacy in a lawful manner towards the election of a certain qualified person as a member of congress, and allege certain acts done in furtherance of the conspiracy. The law makes such a conspiracy an offense. Now, as the support and advocacy which the alleged conspirators sought to prevent were, as stated in the first and second counts, to be given in the future, it is clearly not necessary to allege what shape that support and advocacy was to take. The defendants could conspire to prevent the advocacy and support, in a lawful manner, by the voters, of the election to congress of the person named, without knowing by what means that advocacy and support were to be carried on, and even before the means were agreed upon by the persons by whom the support and advocacy were to be given. Might not the offense of conspiracy, as was said by Justice Bayley, be complete before it was possible to know or aver what was the manner in which the support and advocacy were to be given?

As an indictment for conspiracy to do an unlawful act need not show what were the means to be used, the offense of conspiracy being complete before the means to carry out the conspiracy are agreed on; so we say that a conspiracy to prevent by force, intimidation and threats any citizen entitled to vote from giving his advocacy or support in a lawful manner to the candidate of his choice, need not set out the acts of advocacy and support, for the crime of conspiracy may be complete before the form in which the advocacy and support is to be given is known to the conspirators, or even to the persons against whom the conspiracy is directed.

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Suppose, for instance, three persons meet together and enter into a conspiracy, by which they agree, in order to prevent an influential person of the opposite political party from giving his support and advocacy to a particular candidate, to arrest him and restrain him of his liberty until after the election, and actually carry their purposes into execution. It is clear that the conspiracy forbidden by section 5520 would be complete, and yet it would be impossible to aver and prove what acts of support and advocacy by the person so restrained were contemplated by him, or were prevented by the conspiracy.

We are of opinion, therefore, that the first count, which does not state the acts of advocacy and support which the defendants are charged with conspiring to prevent, is not defective in that particular; and as the second and third counts do set out the acts which the conspiracy was directed to prevent, without, it is true, giving details of time and place, that *a fortiori* they are not open to the objection under consideration.

2. In support of the second objection to the indictment it is said that, under the law of conspiracies, should an overt act result in murder, the conspiracy is lost in the greater crime. The indictment, it is said, alleges that in the execution of the conspiracy the conspirators shot the parties against whom the conspiracy was formed, and it is claimed that these allegations show a merger of the lesser crime in the greater, and so, on the face of the indictment, show a want of jurisdiction in this court.

It is sufficient to say, in answer to this objection, that, in the first place, the indictment does not disclose any crime committed by the defendants of a higher degree than the conspiracy charged, and if it did, it would not follow that this court would be ousted of jurisdiction to try the accused for conspiracy. Even if it were shown that the defendants had been guilty of murder—that being an offense against the law of another sovereignty, and not against the laws of the United States, and therefore not triable in the federal courts—this court would not be ousted of jurisdiction merely

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because it was disclosed that an offense of a higher grade had been committed against the laws of the state.

3. The third objection to the indictment, which was the one most earnestly pressed, is that the act upon which it is founded is unconstitutional—or, rather, to state the objection more precisely, that congress was without constitutional authority to pass the act.

In the case of *Fletcher v. Peck*, 6 Cranch, 187, Chief Justice Marshall said: “The question whether a law be void for its repugnancy to the constitution is at all times a question of delicacy which ought seldom if ever to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.”

And, in the case of *Dartmouth College v. Woodward*, 4 Wheat., 625, the same eminent judge said, speaking in reference to the constitutionality of a legislative act: “On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the constitution.”

Guided by these words of caution, we shall consider the question now to be passed upon.

The clauses of the constitution of the United States which it is claimed empower congress to pass the act in question are section two of article one, which declares that “The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature,” and section four of the same article, which provides

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that "The times, places and manner of holding elections for the senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators," and the last clause of section eight, article one, which declares that "congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

The question whether this legislation is supported by section 2 of article 1, above quoted, depends on whether that section confers the right to vote for members of congress on such electors in the state as are qualified by its laws, as electors of the most numerous branch of the state legislature. If such a right is conferred, then it is a right which congress has power to protect by law.

Rights and immunities created by, or dependent upon, the constitution of the United States, can be protected by congress: *United States v. Reese*, 92 U. S., 217; *United States v. Cruikshank*, *Id.*, 542.

It is true, and has been so said by the Supreme Court of the United States, that the constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the states: *Minor v. Happersett*, 21 Wall., 178.

But this language refers solely to voters at an election for state officers, and so far as such elections are concerned, the United States has no voters of its own. In the case of the *United States v. Reese*, 92 U. S., 217, the Supreme Court expressly reserves any opinion on the effect of article 1, section 4, of the constitution in respect to elections for senators and representatives.

The constitution does not describe a class who, independent of state laws, are entitled to vote for members of congress. But section 2 of article 1 declares in the most unmistakable terms that members of congress shall be chosen by the people of the several states, who shall have the qualifications requi-

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site by the state laws for electors of the most numerous branch of the state legislature.

Now, the question is, has an elector who is qualified by state law to vote for the most numerous branch of the state legislature, a right conferred upon him by this clause of the constitution to vote for members of congress? To us it seems clear that he has. Suppose a state should attempt by law, though without distinction as to race, color or previous condition, to exclude a certain part of those having the qualifications requisite for electors of the most numerous branch of the state legislature from the right to vote for members of congress. Would such an act be constitutional? Clearly not. And it is clear also that it would deprive the excluded citizen of a right derived from the constitution of the United States, which says to him if you are qualified to vote for the most numerous branch of the state legislature you are qualified to vote for members of congress, and the house of representatives shall be composed of members chosen by electors such as you. It seems to be clear that the language of the section under consideration could not have been intended merely to give a basis of representation; that was provided for by other clauses of the constitution. If this be so, it must follow that it was intended as a declaration as to who of the people of the states should have the right to vote for representatives in congress. As, therefore, the elector qualified by state laws derives his right to vote for members of congress from the constitution of the United States, congress has the power to protect him in that right.

Section 4 of article 1, in effect, declares that the congress may at any time, by law, make regulations prescribing the time, place and manner of holding elections for senators and representatives, except as to the places of choosing senators.

The purpose of conferring this power upon congress was that the country might not be in danger of having no congress through the indifference of the states or their hostility to the general government.

It was to place it out of the power of the states to prevent the election of a congress by obstructive laws or in any other

way. The ultimate right of regulating the time, place and manner of choosing representatives, and the time and manner of choosing senators, was therefore given to congress, so that it might always be within the power of congress to secure the election of a senate and house of representatives: Story on the Constitution, section 817.

The clause of the constitution under consideration does not confer rights or privileges upon the individual citizen. It is a clause framed to secure the existence of the government itself, and was made in the interest of all the people of all the states.

Such being the object and scope, what is the power granted by it? It authorizes congress to regulate the time, place and manner of choosing representatives in congress. The terms "time and place" need no commentary. What is meant by the words "manner of holding elections?" An election is not simply the depositing of a ballot in a box. If the elector is forced to vote a certain ballot against his will it is not an election so far as he is concerned, and equally so if he is prevented by violence from voting at all. An election is the expression of the free and untrammelled choice of the electors. There must be a choice and the expression of it to constitute an election. Under our American constitution an election implies a free interchange and comparison of views on the part of the people who are voters, and finally an independent expression of choice. Any interference with the right of the elector to make up his mind how he shall vote is as much an interference with his right to vote as if he were prevented from depositing his ballot in the ballot-box after he had made up his mind.

It is conceded that congress may declare that the elections for representative shall be by ballot. Congress has so declared without objection or challenge from any quarter: Revised Statutes, section 27. What was the purpose of that enactment? Clearly that the elector might be free to vote according to his choice. If it is within the power of congress for such a purpose to regulate his method of voting, congress could adopt any other measures leading to the same

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result. It could say that armed men should not infest the vicinity of the polls ; it could say that the voters should have the right of free interchange of views on the day of voting. All this would as clearly be regulating the manner of holding the elections as prescribing that the election should be by ballot. If congress could make such regulations for election day it could make them for any previous day. In short, in prescribing the manner of holding elections, it could protect the voter in making his choice, and afterwards expressing that choice at the polls, for both these things are included in an election.

Suppose our method of elections were like that used in England, where the candidates appear upon the hustings and address the voters, and the vote is taken, as it often is, by a show of hands ; would not an act of parliament making any violence offered to the candidates, while addressing the voters, a penal offense be a regulation of the manner of holding the election ? With us the canvass sometimes lasts for weeks, but that does not change the principle. Any law the purpose of which is to enable the voter to make a free and intelligent choice, and to express that choice freely at the ballot-box, is a regulation of the manner of holding the election.

The act of congress under consideration was framed for that purpose in respect to elections for representatives in congress, and it seems to us is plainly warranted by section 4, article 1, of the constitution.

The first and fourth sections of article 1, taken together, it seems to us leave no doubt upon the question. The first declares that representatives shall be elected by the people of the states, and adopts the qualification of electors prescribed by the states for electors of the most numerous branch of the legislature. The second authorizes congress to regulate the manner of holding such elections. The two sections are intended to place the election of representatives in the ultimate power of congress, so as to secure at all times a house of representatives, first by preventing obstructive legislation by the states, and, second, securing to the voter the protection of the general government.

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We both concur in the opinion that the legislation under consideration is clearly within the constitutional power of congress, and our judgment is that the demurrer to the indictment should be overruled.

THE UNITED STATES V. L. VINCENT REEVES ET AL.

1. Where a juror was summoned to the November term, 1876, and was impaneled and sworn on December 11, 1876, and afterwards was summoned as a juror to the November term, 1878, and was impaneled and sworn on December 14, 1878: *Held*, that he was not liable to challenge under section 812 of the Revised Statutes, although his service as a juror under the first summons extended to April 27, 1877.
2. Defendants who have not had any earlier chance to object to the composition of the grand jury by which they have been indicted, may do so by plea in abatement.
3. The fact that a grand juror had, on a previous summons, attended the court as a juror within two years, does not constitute such a disqualification under section 812 of the Revised Statutes as will render bad any indictment found by the grand jury of which he is a member.

Heard on demurrer to pleas in abatement.

Mr. A. H. Leonard, U. S. attorney, for the United States.

Messrs. W. F. Mellen, D. C. Labatt and Julius Aroni, for defendants.

WOODS, Circuit Judge. The pleas in abatement are based on section 812 of the Revised Statutes, which declares: "No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of said challenge."

One plea alleges, in substance, that P. E. Bechtel was summoned as a juror at the November term, 1876, of this court, and was impaneled and sworn as a grand juror on December 11, 1876, and continued to serve as such grand juror until

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April 27, 1877; and that the same P. E. Bechtel was summoned as a juror at the November term, 1878, of this court, and was impaneled and sworn as a grand juror on December 14, 1878, and continued to serve as said grand juror until March 1, 1879, and until the indictment in this case was found and returned, and was of the panel by which said indictment was found and returned.

The other plea alleges that J. B. Glandin was summoned to serve as a juror in this court for the November term, 1877, and was sworn and impaneled as a petit juror in November, 1877, and served as such until January 22, 1878, and that said Glandin was summoned as a juror for the November term, 1878, of this court, and on December 14, 1878, was impaneled and sworn as a grand juror in this court, and continued to serve as such up to March 1, 1879, and was of the panel by which said indictment was found.

To these pleas the U. S. attorney has filed a demurrer on the ground that the same were bad in law.

As to the first plea, it is obvious to remark that the facts stated do not bring it within the terms of the section on which it is predicated. It does not appear from this plea that Bechtel was summoned "more than once in two years," nor does it appear that the juror has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge." It does not appear from the plea precisely when the juror named was summoned, but it is stated that, in the first instance, he was summoned to the November term, 1876, and in the second to the November term, 1878. The period of two full years had elapsed between the beginnings of these two terms.

According to the plea under consideration, the juror was impaneled and sworn on the grand jury on December 11, 1876, and was not again impaneled and sworn until December 14, 1878, a period of more than two years. Even supposing he had been challenged on the day he was sworn, the challenge would have been ineffectual, for the juror had not been summoned and attended as a juror within two years, for at

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least a part of the term at which he last attended was held more than two years previously.

I do not think that the fair construction of this section is that twenty-four months must elapse between the close of the term at which a juror is summoned and serves and the beginning of the next term at which he is competent to serve. In this district this construction would render a juror incompetent for nearly two years and six months, for the November term of the court invariably lasts until the third Monday of April following. But the law in effect is, that he may be summoned as often as once in two years. It cannot be that the law allows a juror to be summoned as often as once in two years and at the same time forbids him to serve oftener than once in two years and six months. The juror named in this plea has not been summoned oftener than that.

This has, so far as I know, been invariably the construction put in this circuit upon the section under consideration.

This plea is, therefore, bad, because the case of the juror named therein does not fall within the terms of section 812.

So far as the lapse of time is concerned, the second plea is not open to this objection. The grand juror named in this plea served on the grand jury by which the bill was found and also served on the grand jury impaneled in November, 1877.

As the defendants have not before now had an opportunity to object to the composition of the grand jury by which they were indicted, they may take advantage of any disqualification of any of the grand jurors by plea in abatement: *U. S. v. Hammond*, 2 Woods, 197, and cases there cited.

The question is, therefore, squarely presented whether the facts set out in this plea render the indictment bad and liable to be quashed.

That depends on whether section 812 imposes a disqualification to serve as grand jurors upon persons who fall within its terms.

It seems doubtful whether section 812 applies at all to grand jurors, especially the second clause of the section, which declares: "It shall be sufficient cause of challenge to

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any juror called to be sworn in any cause, that he has been summoned and attended said court as a juror, at any term of said court held within two years prior to the time of said challenge." Grand jurors are not called to be sworn in any cause. They are sworn to investigate offenses against the criminal law generally, and causes which they institute where there has been no previous arrest are not in existence until their duty in reference thereto is fully completed and ended. The clause just quoted would not, therefore, seem to apply to them. It appears rather to be aimed at jurors taken *de talibus circumstantibus*—persons not regularly summoned as jurors, but called in as talesmen from the by-standers.

But, conceding that the entire section applies to grand as well as petit jurors, the question is, does the section impose such a disqualification on a grand juror as would render an indictment found by a jury of which he was a member bad.

It is easy to perceive that it was the object of congress, by the enactment of section 812, to secure the selection of jurors who were from the body of the district, and they should not be professionally or habitually called into the courts of the United States.

To effectuate this object they made two provisions, the first of which is a direction to those who select the array that they shall not summon any person who has been summoned within two years; and, second, that if, through ignorance of the facts, any person should be twice summoned within two years, and should have attended within that period he might, when called to be sworn in any cause, be challenged. Congress has not seen fit to impose any consequence of invalidity upon verdicts, either by direct language or by necessary implication, when jurors were not challenged for this cause, who might have been.

The language of this section is guarded with great precision, and is in marked contrast with that of section 820. There is a distinction to be observed between a positive disqualification and a cause of challenge. Thus section 820 declares certain acts done by a person summoned as a juror to be a cause of disqualification and challenge. The use of

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the word "disqualification" has some purpose, and implies that there may be causes of challenge which are not positive disqualifications.

In *United States v. Hammond*, 2 Woods, 197. I have held that section 820, by its very terms, rendered a juror disqualified, and thereby necessarily invalidated the finding of the jury in cases where there could be no waiver. But the language of the section now under consideration leaves the juror competent, not disqualified, though liable to challenge when called to be sworn, as manifestly as section 820 affects him with absolute disqualification.

In *Monroe v. Brigham*, 19 Pick., 368, Chief Justice Shaw makes this distinction, and held in effect that the fact that a juror was over the age of sixty-five years, which, by the law of Massachusetts, was not only a ground of exemption from jury duty, but also a ground of challenge by either party to the suit, did not absolutely disqualify the juror from sitting in the case, or furnish ground for setting aside the verdict returned by the jury of which he was a member.

I think the distinction rests on solid grounds.

Pleas in abatement being dilatory are not favored.

O'Connell v. Regina, 11 Clark & Fin., 155; *Commonwealth v. Thompson*, 4 Leigh, 667; *State v. Newer*, 7 Blackf., 307.

In the case of *The People v. Jewett*, 3 Wend., 321, the defendant and one Burrage Smith were indicted for having, with others, conspired without legal authority or justifiable cause to carry off and transport one William Morgan to a place unknown.

Objection was taken to the indictment that one Benjamin Wood, one of the grand jurors, had, before the finding of the bill of indictment, in repeated conversations declared that the defendant was concerned in the abduction of Morgan, aided in carrying him off, was guilty thereof, and ought to be punished therefor; and it was alleged that the defendant had not been apprised of any criminal proceeding against him, not having been arrested or required to enter into recognizance.

In reply to this objection, Savage, Chief Justice, said:

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“The books are silent on the subject of such exception after indictment found, and in the absence of authority I am inclined to say, in consideration of the inconvenience and delay which would ensue in the administration of criminal justice were a challenge to a grand juror permitted to be made after he was sworn and impaneled, that the objection comes too late.”

In the same case Marcy, Justice, said: “As the defendant was not recognized to appear at the sessions when the indictment was found, he did not know that any charge would be laid before the grand jury against him, and consequently he had no opportunity to object to the jurors before they were sworn and had presented their indictment. * * Though I feel the force of the argument, that the defendant should be allowed the benefit of an exception to a partial grand juror, I cannot turn my view from the consideration of the great delays and embarrassments which would attend the administration of criminal justice if it was to be obtained in the way now proposed. No authority for adopting this course was shown on the argument, and I have not since been able to find any.”

And in *Monroe v. Brigham, supra*, Chief Justice Shaw remarks: “Upon general grounds, unless presumptively required by statute, it would be inconsistent with the purposes of justice to allow such an exception to a juror. * * Where no other incapacity exists, and no injustice is done, nothing but a positive rule of law would seem to require that a verdict should, on that account be set aside.”

This authority is cited merely to show how reluctant the courts are to interfere with the indictments of a grand jury by reason of the unfitness of one or more of the grand jurors. Nevertheless, courts will interfere where there has been a positive disqualification imposed by statute. But as, in my judgment, the fact that the juror has served within two years as a juror in the court is not made by section 812 a positive disqualification, but only a ground of challenge, I do not think that it can be urged as a reason for quashing the indictment.

Demurrer to pleas in abatement sustained.

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CHARLES EDWARD LEWIS V. THE CITY OF SHREVEPORT.

1. The charter of a city declared that "the city council may, when it deems it for the public interest, provide for the construction of a city hall, markets and other structures of public necessity and utility, the cost of which shall be paid by the city, provided that whenever the amount or cost * * of erecting the structures aforesaid, from time to time, exceeds the amount of funds in the city treasury, then the council are hereby authorized to issue bonds of the city, * * and said council shall have power to dispose of said bonds in such manner as they may deem for the best interests of the city, the proceeds of which shall be used solely for the purpose for which they shall be issued; and, also, that "no ordinance * * providing for the purchase of real estate shall be passed except by a majority of the council."

Held, that these provisions of the charter did not authorize the city council to issue bonds to pay for a tract of land within or near the city limits, to be given to a foreign railroad corporation on which to establish and maintain its depot and machine shops.

2. To authorize a municipal corporation to issue bonds for purposes not fairly coming within the ends for which municipal corporations are created, there must be a legislative grant of power either in express terms or by necessary implication.
3. A municipal corporation cannot clothe itself with power to issue bonds for extraneous purposes by the assertions of the legislative, executive and judicial departments of its government, and of its inhabitants, that it possesses the power.
4. In deciding whether a municipal corporation has power to issue bonds for a specific purpose, the construction put upon the charter by all parties in interest, and where rights have grown up under that construction, is entitled to weight only in a case where the power may be fairly inferred from the terms of the charter. In such a case, doubts and ambiguities will be resolved in favor of the power.
5. Where a municipal corporation issues bonds for a purpose not authorized by its charter, it cannot be estopped from denying its authority to do so by the acts of its inhabitants and officers, nor by receiving and retaining the consideration for which the bonds were issued.
6. An issue of bonds by a municipal corporation, without authority of law, cannot be ratified by its officers without the sanction of the legislature.

This suit was brought to recover the amount of certain over-due interest coupons belonging to nine negotiable bonds for one thousand dollars each, issued by the defendant.

The parties waived the intervention of a jury, and having

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agreed upon the facts, submitted the case to the court upon the law arising on the agreed facts.

It appeared, from the agreement of the parties, that on April 27th, 1871, an act was passed by the legislature of Louisiana, "to incorporate the city of Shreveport, to define its limits and provide for its better police and municipal government."

This act constituted the charter of the city at the time the bonds in question were issued and sold. Section 3 of the charter provided that the government of the city of Shreveport, and the administration of its affairs, should be vested in a mayor and four administrators, who should form its council. Section 10 declared, "The council shall have full authority to make and pass such by-laws and ordinances as are necessary and proper, * * * to regulate and make improvements to the streets, public squares, etc., and, if for such purpose the land of any private person or body corporate is necessary to be had, the said city council shall have the right and power of purchasing the same at a reasonable price, or cause the same to be expropriated," etc.

Section 17 declared, "The council may, when it deems it for the public interest, provide by ordinance for the paving, opening or widening of any street or streets, or the construction of a city hall, markets and other structures of public necessity and utility, the cost of which shall be paid by the city, provided that whenever the amount or cost of paving said streets, or erecting the structures aforesaid from time to time, exceeds the amount of funds in the city treasury, then the council are hereby authorized to issue bonds of the city running forty years, with interest coupons attached, and bearing interest at the rate of and not exceeding ten per cent per annum, payable semi-annually, * * * and said council shall have power to dispose of said bonds in such manner as they may deem for the best interest of the city, the proceeds of which shall be used solely for the purpose for which they shall be issued.

Section 20 declared, "No ordinance * * * providing

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for the purchase or sale of real estate shall be passed, except by a majority of the council," etc.

On June 26th, 1872, the city council enacted an ordinance which provided for the purchase of certain real estate to be given to the Texas & Pacific railroad company, upon which the company was permanently to establish and maintain its depots and machine shops; which provided for the payment of the purchase price of such real estate by the issue and sale of the bonds of the city to the amount of \$260,000, payable forty years after date, with interest at eight per cent per annum, payable semi-annually, and with interest coupons attached; which provided for the levy of an annual tax to pay the principal and interest of the said bonds, and which provided that said ordinance should be submitted to a vote of the people of the city for their ratification and approval. This ordinance is the one by virtue of which the bonds in question were issued and sold.

On July 1, 1872, the said ordinance was submitted to a vote of the people of the city, and seven hundred and five votes were cast for and three votes against its ratification and approval.

On July 1, 1872, in pursuance of the ordinance and vote aforesaid, and for the purpose named in the ordinance, the city issued its bonds for \$260,000.

On July 19, 1872, the city council passed an ordinance authorizing George Williamson, Esq., who was appointed the agent of the city for that purpose, to sell said bonds at sixty cents on the dollar.

On July 23, 1872, the city council appropriated money to pay the cost of engraving said bonds, and the expenses incurred by Williamson in his effort to sell them.

On October 31, 1872, the city attorney, as such officer, gave an opinion that the city had power to issue said bonds, and that the object for which said bonds were issued was of public utility, and clearly within the power conferred by the city charter.

On the same day, the city council passed an ordinance whereby said Williamson was appointed special agent of the

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city to sell said bonds, and upon the failure to sell, authorized him to execute the promissory note of the city for \$130,000, and to pledge said bonds as security for the payment of the same, and to pledge the faith of the city to make good any arrangement entered into by him in the sale of said bonds, or in raising money thereon. Williamson, as agent for the city, appointed one Jamison, of Philadelphia, to sell the bonds, and the city council, by ordinance, ratified the appointment.

On November 7, 1872, the city council passed an ordinance whereby Williamson was authorized to turn over to Thomas A. Scott, Esq., \$200,000 of said bonds upon his assuming the payment of the indebtedness incurred by the city in the purchase of said real estate, to be donated to the Texas & Pacific railroad company.

The city council, on December 17, 1872, passed an ordinance levying a tax to pay the principal and interest of said \$260,000 of bonds.

The city administrator of finance, on March 1, 1873, made an official statement of the amount of the indebtedness of the city, in which statement was included the said bonds, and on March 27, 1873, Williamson, as agent of the city, wrote to Jamison a letter in which he stated that ample provision had been made by ordinance enacted by the city council for the payment of the principal and interest of the \$260,000 of bonds.

On June 13, 1873, the city council passed an ordinance pledging the faith of the city to pay the said promissory note made by Williamson, as its agent, to secure the payment of which the said \$260,000 of bonds had been hypothecated, and instructing the city administrator of finance to hold sacred for such purpose the tax levied by ordinance of December 17, 1872.

The official budget of the city, published on November 27, 1875, contained a statement of the indebtedness of the city on that day, in which was included the \$90,000 of said bonds held and owned by the plaintiff, the same being the bonds to which the coupons said on belong.

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The plaintiff was a *bona fide* holder of the bonds to which the coupons sued on belong, and of said coupons, having purchased said bonds, with the coupons attached, in open market, paying therefor eighty-five cents on the dollar.

Both bonds and coupons were negotiable in form, being payable to bearer.

The Texas & Pacific railroad company had never been chartered by the state of Louisiana, but held a lease from the Vicksburg, Shreveport & Texas railroad company, of the railroad between Shreveport and the Texas line, which lease is still in force.

The coupons sued on were produced by the counsel of the plaintiff, and filed as evidence in the cause.

Messrs. Alfred Ennis, Geo. S. Lacy and Frank N. Butler, for plaintiff.

First. The defendant had power, under its charter, to make and issue the bonds. (See provisions of charter set out in the agreed facts.) The construction put upon the charter by the municipal corporation and the people, and followed by them, on the strength of which the municipal corporation has sold its bonds and received value therefor, will be maintained by the courts, even though the authority to issue the bonds is denied from an ambiguous and ill-expressed statute: *James v. Milwaukee*, 16 Wall., 159; *Woodhull v. Beaver County*, 3 Wallace, Jr., 274; *Luling v. City of Racine*, 1 Bissell, 314; *Van Hostrup v. Madison*, 1 Wall., 291; *City of Memphis v. Brown*, 11 Am. Law Register (N. S.), 629; *Gas Company v. San Francisco*, 9 Cal., 453; *Meyer v. Muscatine*, 1 Wall., 393; *Schenck v. Supervisors of Marshall County*, 1 Biss., 533.

Second. Having issued the bonds, sold them in open market, received and retained the consideration therefor, and the bonds having subsequently come to the hands of plaintiff *bona fide* and for value, the city is estopped from denying its authority to issue the same or denying the validity thereof: *Hood v. N. Y. & N. H. R. R. Co.*, 22 Conn., 502; *Treadwell v. Commissioners*, 11 Ohio St., 183; *Hopper v. Brown*, 13 Ohio St., 311; *Garrett v. Van Horn*, 7 Ohio St., 327; *Goshen v. Shoemaker*, 12 Ohio St., 623; *Supervisors v.*

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Schenck, 5 Wall., 772; *City of Nauvoo v. Ritter*, 97 U. S., 389; *Society for Savings v. The City of New London*, 29 Conn., 174; *Ferguson v. Landrum*, 1 Bush (Ky.), 548; *Zabriskie v. Cleveland, Col. & Cin. Railroad Co.*, 23 How., 381; *Cromwell v. Sac County*, 96 U. S., 51.

Messrs. A. H. Leonard, J. D. Rouse, Wm. Grant, and W. A. Seay, for defendant.

WOODS, Circuit Judge. The power of the city of Shreveport to issue the bonds in question is denied. The power, according to the claim of plaintiff, is to be found in section 17 of the city charter, which authorizes the council, when it deems it for the public interest to provide for the construction of a city hall, markets and other structures of public necessity and utility, and under certain circumstances, to issue bonds in payment thereof, and section 20, which says, "no ordinance for the purchase or sale of real estate shall be passed except by a majority of the council."

Under these provisions it is claimed that the city council had authority to issue and sell bonds of the city to the amount of \$260,000 for the purpose of paying for real estate, to be given to a foreign railroad corporation, on which to establish and maintain its depots and machine shops. To my mind, the proposition seems utterly untenable. The power given is to erect a city hall, markets and other structures of public necessity and utility; clearly the purpose for which the bonds in suit were issued was not to erect a city hall or markets. Does the donation of land to a railroad company, on which to build its depot and shops, fall within the terms "other structures of public necessity and utility?" Lord Bacon observes that "as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated." Hence the celebrated rule that "when particular words are followed by general ones, as it often happens after an enumeration of several classes of persons or things, there is added "and all others," the general words are restricted in meaning to objects of like kind with those specified:" 1 Bishop's Crim. Law, sec. 275.

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Applying this rule to the interpretation of the clause of the charter relied on for authority to issue bonds, it is clear how perfectly baseless is the construction claimed. The charter, under this rule, means to authorize the city council to erect a city hall, markets and other like structures of public necessity and utility. This would include houses for fire engines, water works, gas works, houses for public schools, all to be owned by the city, and in which all the citizens should have an interest. To stretch the clause so as to authorize the purchase of land by the city to be given away to a private corporation, on which it was to erect structures for its own uses, is, to my mind, entirely unwarrantable. Can it be claimed for a moment that such a use of the power to issue bonds entered into the contemplation of the legislature?

“A municipal corporation is but a subordinate branch of the government. It represents the state sovereignty in a limited district, and for specific purposes. These purposes are local government and police.

“The power of taxation is granted as a means of carrying out these purposes. The diversion of these revenues to other purposes is unlawful and *ultra vires*. If it is desirable that a municipal body should have the power of subscribing to railroads or plank roads, or of issuing commercial securities to be sold in the financial markets, it is time enough for it to do so when authorized thereto by legislation. It possesses no powers but such as are given to it expressly or by necessary implication:” Mr. Justice Bradley, in *Chisholm v. The City of Montgomery*, 2 Woods, 594. See, also, Dillon on Municipal Corp., section 106; *Mayor v. Ray*, 19 Wall., 468; *Knapp v. Mayor of Hoboken*, 34 N. J. L., 394; Jones on Railroad Securities, sections 222, 223.

Applying this rule to the question in this case, can it be said that the power exercised by the city council of Shreveport in issuing bonds for the purpose mentioned is expressly given by the charter, or results from necessary implication? It seems to me that it is unnecessary to multiply words to

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show that the power is not conferred. It is perfectly obvious that such was not the purpose of the legislature. The absence of such a power is too plain for argument.

But the plaintiff claims that the people of the city and the judicial, legislative and executive departments of its municipal government have placed a construction on its charter and on the ordinance by virtue of which the bonds were issued, which justifies the issue of the bonds, and that the city is therefore liable to pay them.

This proposition amounts to this, that a municipal corporation can clothe itself with power to issue bonds for extraneous purposes by asserting that it possesses it.

On the other hand, the current of authority is unbroken that to authorize a municipal corporation to subscribe for stock in a public improvement and pay for it by the issue of negotiable securities, there must be a legislative grant of power either in express terms or by necessary implication: *Thomson v. Lee County*, 3 Wall., 330; *Dillon on Municipal Corporations*, section 106, and many cases there cited.

The proposition that when the power has not thus been conferred, it may be acquired by a municipal corporation by a persistent assertion that it has the power, and by acting as if it had it, is inconsistent with all the cases cited.

The intention of the legislature is to be sought for; that whatever it may be constitutes the law: *James v. Milwaukee*, 16 Wall., 161.

In deciding whether a municipal corporation has power to issue bonds for a specific purpose, the construction put upon the charter by all parties in interest, and where rights have grown up under that construction, is entitled to weight only in a case where the power may be fairly inferred from the terms of the charter. In such a case doubts and ambiguities will be resolved in favor of the power.

Thus, in *Woodhull v. Beaver County*, 3 Wallace, Jr., 274, Judge Grier says: "But now, when all parties have given their construction to the act, and it can by its terms be made to include the power, the court will not exercise *astutia* to give

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it a stringent interpretation in order to enable a county to disown its obligations after having received their value."

To the same effect are the following cases: *James v. Milwaukee*, 16 Wall., 159; *Van Hostrup v. Madison*, 1 Wall., 297; *Meyer v. Muscatine*, 1 Wall., 393.

But in all these cases there was reasonable ground in the acts of the legislature for the construction by which the power to issue the bonds was derived. In this case authority for the power exercised is wholly wanting, and by no reasonable or fair construction can it be presumed.

The plaintiff further claims that by the acts of its people and officers set in the record, and by the fact that the city has received and still retains the consideration for which the bonds were sold, she is estopped from denying their authority to issue the same, and from denying their validity.

The authorities cited by counsel for plaintiff from the U. S. Supreme Court Reports to sustain their proposition do not sustain it. They only decide that when the power to issue bonds is given to a municipal corporation, the corporation is estopped from setting up irregularities in their issue.

But where the power is wanting there is no estoppel, and there can be no ratification by the municipal corporation or its officers.

In *Chisholm v. The City of Montgomery*, *supra*, Mr. Justice Bradley said: "The plea that the city is estopped by the acts of its officers, by the resolutions of the city council, or by the negotiable form or other matter in the bonds themselves, from denying the authority of such officers to pledge the faith of the city in aid of said plank roads and to issue the bonds in question, cannot be maintained. Public officers cannot acquire authority by declaring that they have it. They cannot thus shut the mouth of the people whom they represent. * * No municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it."

In the case of *Marsh v. Fulton County*, 10 Wall., 684, the Supreme Court of the United States says: "It is also contended that if the bonds in suit were issued without

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authority, their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification, even by the supervisors. But the answer to all of them is, that the power of ratification did not lie with the supervisors. A ratification is in its effect upon the act of the agent equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act originally existed. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified."

So in *Loan Association v. Topeka*, 20 Wall., 667, the same court says: "We do not attach any importance to the fact that the town authorities paid one installment of interest on their bonds; such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest which was equally unauthorized cannot create of itself a power to levy taxes resting on no other foundation than the fact that they have once been illegally levied for that purpose."

See also, *Town of South Ottawa v. Perkins*, 94 U. S., 266.

The want of power in the officers of the city of Shreveport to ratify the issue of bonds is as clear as their want of power to issue the bonds in the first instance. When contracts are ratified, it must be by a person or body having the power to ratify: *Delafield v. The State of Illinois*, 2 Hill, 159; *Hotchin v. Kent*, 8 Mich., 526; *Dubuque Female College v. The District Township of the City of Dubuque*, 13 Iowa, 555; *Estey v. The Inhabitants of Westminster*, 97 Mass., 324.

The decisions of the Supreme Court of the United States are uniform to the effect that a municipal corporation cannot without legislative authority issue bonds in aid of an extraneous object: *Marsh v. Fulton County*, 10 Wall., 676; *Pendleton County v. Amy*, 13 Wall., 297; *Kenicott v. The Supervisors*, 16 Wall., 452; *St. Joseph Township v. Rogers*, 16 Wall., 644; *Harshman v. Bates County*, 92 U. S., 569; *Town*

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of *Coloma v. Evans*, 92 U. S., 484; *Town of South Ottawa v. Perkins*, 94 U. S., 260.

That power cannot originate or be derived from a vote of the people. The source of the authority is the legislature.

In this case there was no power in the city of Shreveport to issue the bonds in question. All persons dealing in the bonds are bound to take notice of this fact.

There can be no *bona fide* holders without notice when there is no power to issue the bonds.

The bonds are void and the holders are presumed to have had notice of this fact when they purchased them.

There must be judgment on the agreed facts for defendant.

THE UNITED STATES V. DANIEL NICHOLSON ET AL.

1. The purpose of section 5515 of the Revised Statutes was only to punish a violation of the state laws regulating elections, when such violation affected the election or the result of the election of a delegate or representative in congress.
2. The election law of the state of Louisiana, approved April 11, 1877, does not authorize the use, by the commissioners of election, of two ballot boxes, one for the election of state and parish officers, and the other for the election of representatives in congress.

This was an indictment under section 5515 of the Revised Statutes of the United States, against three commissioners of election appointed under the state law to conduct an election for member of congress, state, parish and ward officers, in one of the wards of Caddo parish, in the state of Louisiana. The charge of the court can be understood without any recital of the facts.

Mr. A. H. Leonard, U. S. attorney, for the United States.

Messrs. J. R. Beckwith, B. F. Jonas, C. H. Luzenberg and *J. C. Egan*, for the defense.

WOODS, Circuit Judge, charged the jury as follows: The defendants in this case are charged in an indictment contain-

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ing two counts. The first count alleges that at the general election for members of congress, held on the fifth of November, 1878, in the Fourth Congressional District, in this state, two of the defendants, to wit, Daniel Nicholson and Samuel Fells, were the commissioners of said election, and the other defendant, Thomas B. Chase, was clerk thereof; and that they, the officers of such election, did unlawfully, feloniously and with intent to affect the result of such election, furnish for use at the said election two boxes for the reception of ballots, in addition to the one provided for by law, and required said boxes to be used as follows: One of the boxes as the exclusive receptacle for all ballots cast for representative in the congress of the United States, one box as a receptacle for all ballots cast for officers of the fourth ward of the parish of Caddo, and the remaining box as the receptacle for all ballots voted for officers of the parish and members of the state legislature.

The first count further charges that the commissioners at the said election announced and proclaimed that all ballots to be voted for representative in the congress of the United States were required to be deposited in the box set apart by them for the reception of such ballots; and that all ballots voted for ward officers were required to be deposited in the box designated for the reception of such ballots; and that all ballots to be voted for the parish officers and members of the state legislature were required to be voted in the box designated for the reception of such ballots by the commissioners. And that the commissioners of the election further proclaimed that any ballot deposited in a box other than the one designated by them for its reception would neither be listed nor counted.

The first count of the indictment further alleges that the said officers of the election refused to count two hundred ballots cast at such election by duly qualified voters of the state and precinct for a representative in the congress of the United States.

The second count charges that the defendants, being officers at said election, as mentioned in the first count, did refuse to perform their duty as such, and did neglect and refuse to

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count two hundred ballots cast at said election by duly qualified voters of the parish and state, for J. Madison Wells for member of congress for the United States.

As to this second count, I say to you, if there is any evidence at all in support of it, it is insufficient to prove the allegation, and it is your duty, therefore, to render a verdict of not guilty on that count.

You will, therefore, address yourselves to the consideration of the question, whether or not the United States have succeeded in establishing the guilt of the accused upon the first count of the indictment.

The presumption of law is, and you will bear it in mind, that the defendants are innocent until it is satisfactorily established that they are guilty, and guilt cannot be satisfactorily shown unless it is proved beyond reasonable doubt.

What is the charge brought against these defendants by the first count? It is that they did an act unauthorized by law, with a view and purpose of affecting the result of the election for member in congress of the fourth congressional district of Louisiana.

I instruct you that congress has no power to punish a state officer for a violation of a state law, if it only affects the election of state, parish or ward officers, and that section 5515 of the Revised Statutes of the United States does not undertake to punish state officers for a violation of state law, so far as such violation only affects the election, or the result of the election, of state, municipal or parish officers.

That section (5515) declares that "every officer of an election at which any delegate or representative in congress is voted for, whether such officer be appointed or created by or under any law or authority of the United States, territorial district or municipal law or authority, who neglects or refuses to perform any duty in regard to the said election required of him by any law of the United States or of any state or territory thereof, or who violates any duty so imposed, or who knowingly does any act thereby unauthorized, with intent to affect any such election, or the result thereof, or who fraudulently makes any false certificates of the result of

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such election in regard to such representative or delegate, or who neglects, withholds, conceals or destroys any certificate of record so required by law respecting the election of any such representative or delegate, or neglects or refuses to make and return such certificate as required by law ; or who aids, counsels, procures or advises any voter, person or officer to do any act by this or any of the preceding sections of this act made criminal, or to omit to do any duty the omission of which is by this or any preceding section of this act made criminal, shall be punished as prescribed by section 5511 of this act."

It is clear that the purpose of this law was only to punish a violation of the state regulations, so far as such regulations affected the election, or result of the election, of a member of congress, and no further.

Now, as to the charge against these defendants under the first count: The state law requires or authorizes the use of one, or at most of not more than two ballot boxes. It is charged that at the general election held on the fifth of November last, these defendants, "with the intent to affect the result of an election for representative in congress, held on that day, employed three ballot boxes, and required that all votes for members of congress should be deposited in one box, and that all votes for parish officers and members of the state legislature should be deposited in another box, and that the votes for ward officers should be deposited in a third box." It is alleged, further, that defendants declared that any votes for a member of congress which might be deposited in a box designated for either the state or parish officers, or for ward officers, would not be counted. And it is further alleged, under the first count, that the object of the defendants in this action was to affect the election, or the result of the election, for member of congress.

The first question for your determination is this: were the acts which are charged against the defendants in this indictment committed by them. There is no dispute between the counsel for the prosecution and the counsel for the defense on this point. It seems to be conceded that three boxes were

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used at the elections held in Caddo parish, at the precinct named, on the fifth of November last.

A question of law arises here, and it is whether or not three ballot-boxes were or were not authorized to be used by the law of this state. It seems that on the tenth day of April, 1877, an act was approved by the governor of this state, providing, among other things, for the election of justices of the peace and constables, and on the eleventh of April, 1877—the next day—an act was approved which provided for the election of the various state officers, and also for the election of members of congress, and this act ended by repealing all laws on the subject of elections, excepting those relating to contested elections.

Under the view I take of this case, it is immaterial whether the act of the tenth of April, 1877, is in force or not. Whether or not it was repealed by the act approved next day is not important.

My judgment is, that the state of Louisiana, by the act of April 11, 1877, did not authorize the employment, by commissioners of election, of a separate ballot-box for state officers and parish officers, and another ballot-box for members of congress.

Section 2 of the act of April 11, 1877, declares, "That the election of members of the general assembly shall be held on the first Tuesday after the first Monday in November."

Section 3 provides that all other officers, the time and place of whose election is not otherwise provided for by law, shall be elected at the time and place provided for the election of senators and representatives. Section 7 declares that all general elections for representatives in congress shall be conducted in the same manner as elections for representatives to the general assembly.

Now, this act, you will see, provides for the election, as I have already stated, of twenty-two members of the general assembly and other state officers, and members of congress. Section twenty-three of the same act declares, that all the names of persons voted for shall be written or printed on

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one ticket, and that the names of the persons and offices voted for shall be accurately printed or written on the tickets.

If this law is followed, it is impracticable that there should be two ballot-boxes, one for parish officers and members of the legislature, and the other for members of congress. In my judgment these commissioners were not in any event authorized, under the law of the state, to employ more than two ballot-boxes for ward, state and parish officers and members of congress. I think that a fair construction of act No. 58 of 1877, shows that the use of one box for the reception of ballots for parish officers and members of the legislature, and another for ballots for members of congress, as it was conceded was done by the defendants, was authorized by law.

The vital question in this case is, what was the intent of the commissioners in using the three ballot-boxes? The prosecution charges that it was done for the purpose of affecting the election of a member of congress, or the result thereof. No matter how much it affected the results of the election for ward officers, parish officers or members of the state legislature; we have nothing to do with that. And unless the purpose of the defendants was to affect the election of members in congress there can be no conviction in this case.

The rule of law is that every man intends the natural result of his act. Now, if the natural result of the act of these defendants was to affect the result of the election of a member of congress, you might infer that such was their purpose.

A question for your consideration is, did the use of three ballot-boxes naturally affect the result of the election of a member of congress? If it did not affect it, that is the end of this case. If it did affect it, then you are to inquire further whether the presumption arising from the nature of the act has been rebutted by the proof.

The defense claims that no such implication would necessarily follow from such an act, and if it did, that they have succeeded in rebutting such implication. On this point the defense has introduced evidence tending to show that one of the defendants, or two of them, perhaps, took legal advice as

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to what their duties were under the acts Nos. 57 and 58 of 1877, of the legislature of the state of Louisiana, and that they were advised that these laws did not prohibit the employment of two or even three ballot-boxes.

I instruct you that if these defendants sought this advice in good faith, with the design and purpose of honestly arriving at what their duties were, and followed that advice in good faith, they cannot be convicted under this indictment.

If the evidence on the part of the prosecution does not satisfy you that the employment of those three boxes, and the manner in which the defendants proclaimed that the different ballots should be deposited therein, were intended to affect the result of the election of a member in congress, you shall find the defendants not guilty.

But if you are satisfied, from the evidence, that they did these acts with a design and purpose to affect the election of a member in congress, and not under an honest mistake as to their duty, if you are satisfied of this beyond a reasonable doubt, it is your duty to return a verdict of guilty as to those defendants who participated in the act, its design and purpose.

Chase, one of the defendants, testified, as I recollect the evidence, that he had nothing to do with the procuring of the two additional boxes, and the defendant Fells testified that the three boxes were at the poll when he arrived there.

If the boxes were there, whether they procured them or not, and if the defendants Chase and Fells concurred in the use to which they were put, it is immaterial who brought the boxes to the polls.

You will take the case and determine whether or not the guilt of the defendants has been made out, and if you are not satisfied beyond a reasonable doubt that every necessary ingredient of the offense charged has been established, you will return a verdict of not guilty. But if you are convinced by the proof that the additional boxes were used by the defendants in the manner charged in the indictment, and for the purpose and with the intent charged, and not under an honest mistake as to their duty, you will find them guilty.

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APRIL TERM, 1879.

THE LOUISIANA STATE LOTTERY COMPANY ET AL. V. JOHN
FITZPATRICK ET AL.

1. The act of congress, approved March 3, 1875, "To determine the jurisdiction of circuit courts of the United States, and for the removal of causes from state courts, and for other purposes," enlarges the jurisdiction of the circuit courts to the full limits authorized by the constitution.
2. A bill in equity which alleged that a state had, by legislative act, chartered a lottery company with the right to exercise its functions for twenty-five years, the lottery company to pay to the state the sum of \$40,000 annually, and had passed a subsequent act repealing the charter of the company, and making it a penal offense to carry on the business authorized by the charter, and which charged that said repealing act impaired the obligation of the contract between the state and the lottery company, disclosed a case arising under the constitution of the United States, of which the circuit court had jurisdiction, irrespective of the citizenship of the parties.
3. The settled doctrine in the United States is that the charter of a private corporation is a contract, the obligation of which cannot be impaired without an infraction of the constitution of the United States; that a grant of franchise is in point of principle identical with a grant of other property; whether the consideration be large or small is not essential, for the motives or inducements which caused the legislature to pass the act cannot be examined to impair its validity.
4. Every valuable privilege given by a charter which conduced to make it acceptable and to promote an organization under it, is placed beyond the power of the legislature, unless the power be reserved at the time the charter is granted.
5. Where a charter conferring the right to draw lotteries has taken the form of an absolute contract, the responsibility of its creation rests with the legislature; the courts must treat it as carrying the obligation which its terms import.
6. A mere license to draw lotteries, which is not inseparable from the essential functions of a corporation, and which has not been acted upon, and under which no rights have been vested, may be repealed by any succeeding legislature of the state by which it is granted.
7. But where such license has been acted on, and under it rights have been vested, it cannot be withdrawn by the legislature to the prejudice of those rights. The power of the legislature to recall or modify it is to that extent gone.

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8. The grant of a privilege to draw a lottery made to an individual, where no rights have become vested, can be revoked.
9. But where a corporation has been called into existence by a state legislature, for a definite object, declared in the act creating it, and has powers and faculties given to it which are in their nature and operation pertinent to its sole object and necessary to its very existence, its rights and franchises cannot be swept away by a repealing act of the legislature of the state which created it.
10. An act of the legislature created a corporation to continue twenty-five years, and then to be dissolved, with a grant of the sole and exclusive privilege of drawing lotteries for the said period, and for the object expressed in the charter, to make of the business a source of revenue to the state, with power to collect capital, issue shares, and to be controlled by directors chosen under the charter, and required the corporation to pay quarterly in advance a specific sum of money to the auditor of state. *Held*, that a charter having these provisions could not be repealed by the legislature.
11. Section 720 Revised Statutes, which declares that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state," has application only to such proceeding as had been commenced before the jurisdiction of the federal court attached.
12. It is the duty of a federal court to interfere to defend the franchises of a corporation from invasion, though disguised in form and to be effected through state officers clothed with statutory power.
13. As an unconstitutional law has no inherent force either to authorize or protect, and therefore no claim to be obeyed and no power to divest rights, the agents of its administration, of whatever name or character, may be called to answer and are individually responsible.
14. Generally, courts of equity do not deal with matters of crime, misdemeanors or offenses against prohibitory laws, but they will interfere, by injunction, to stay proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or to make it less valuable for use or occupation.
15. Where a charter, such as is described in head note nine, is repealed by the legislature, and the exercise of the rights and franchises conferred by the charter is made a penal offense: *Held*, that the officers of the state charged with the enforcement of the penal laws would be enjoined from arresting or otherwise interfering with the officers and agents of the corporation for acts done by them in the exercise of the rights conferred by said charter.

IN EQUITY. Heard upon motion for injunction *pendente lite*.

The bill was brought by the Louisiana State Lottery Company, a Louisiana corporation, Charles T. Howard, a citizen

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of Mississippi, and John A. Morris, a citizen of New York, against Allen Jumel and twelve other citizens of Louisiana, and against the city of New Orleans. It was filed April 1, 1879.

The case made by the bill was substantially as follows: On August 11, 1868, the legislature of Louisiana passed an act entitled "An act to increase the revenues of the state, and to authorize the incorporation and establishment of the Louisiana State Lottery Company, and to repeal certain acts now in force." This act was approved, and took effect as act No. 25, on August 23, 1868.

The following are the sections which are material to the controversy raised by this suit:

"Section 1. Be it enacted, etc., That whereas many millions of dollars have been withdrawn from and lost to this state by the sale of Havana, Kentucky, Madrid and other lottery tickets, policies, combinations and devices, and fractional parts thereof, it shall hereafter be unlawful to sell, offer or expose for sale, any of them, or any other lottery, policy or combination ticket or tickets, devices or certificates, or fractional parts thereof, except in such manner or by such persons, their heirs, executors and assigns, as shall be hereinafter authorized.

"Section 2. That the following named persons, to wit: Robert Bloomer, Jesse R. Irwin, John Considine, Charles H. Murray, F. F. Wilder, C. T. Howard, Philip N. Lockett be, and they are hereby constituted and declared a corporation for the objects and purposes, and with the powers and privileges hereinafter specified and set forth:

"ARTICLES OF INCORPORATION.

"Article 1. The name and title of this corporation shall be the Louisiana State Lottery Company, and the domicile thereof shall be in the city of New Orleans, in the state of Louisiana.

"Article 2. The objects and purposes of this corporation are: First. The protection of the state against the great losses heretofore incurred by sending large amounts of money to other

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states and foreign countries for the purchase of lottery tickets and devices, thereby impoverishing our own people. Second. To establish a solvent and reliable home institution for the sale of lottery policies and combination tickets, devices and certificates, fractional parts thereof, at terms and prices in just proportion to the prizes to be drawn, and to insure perfect fairness and justice in the distribution of such prizes. Third. To provide the means to raise a fund for educational and charitable purposes for the citizens of Louisiana.

“Article 3. The capital stock of this corporation shall be one million of dollars, represented by ten thousand shares of one hundred dollars each.

“Article 4, section 1. The company shall have the right to commence operations when one hundred thousand dollars of the stock is subscribed and paid in.

“Section 2. All powers of this corporation shall be vested in a board of directors, to consist of seven persons, each of whom shall own at least ten shares of the capital stock.

“Section 3. The corporation shall have the right to sue and be sued, to plead and be impleaded, and to appear in any court of justice, and to do any other lawful act such as any person or persons might do for their own defense, interest or safety.

“Section 4. The president of the board of directors shall be the proper person upon whom to serve citations, notices and other legal process wherein this corporation may be interested.

“Article 5, section 1. The corporation shall pay to the state of Louisiana the sum of forty thousand dollars per annum, which sum shall be payable quarterly in advance, from and after the first day of January, 1869, to the state auditor, who shall deposit the same in the treasury of the state, and which sum shall be credited to the educational fund, and said corporation shall be exempt from all other taxes and licenses of any kind whatever, whether from state, parish or municipal authorities.

“Section 2. The corporation shall furnish bonds to the auditor in the sum of fifty thousand dollars, as security for

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prompt and punctual payment of the sums set forth in the preceding section.

“Section 3. That any person or persons selling, or offering or exposing for sale, after the thirty-first day of December, 1868, any lottery, policy or combination tickets, devices or certificates, or fractional parts thereof, in violation of this act, and of the rights and privileges herein granted to this corporation, shall be liable to said corporation in damages in a sum not exceeding five thousand dollars, nor less than one thousand dollars for each offense, recoverable by suit before any court of competent jurisdiction.

“Section 4. That this corporation shall be and continue for and during the term of twenty-five years from the first day of January, 1869, for which time it shall have the sole and exclusive privilege of establishing and authorizing a lottery, or series of lotteries, and selling and disposing of lottery tickets, policy, combination devices and certificates, and fractional parts thereof.”

By virtue of the provisions of this act, the Louisiana State Lottery Company was immediately organized, and has continued up to the time of filing this bill to do and perform what the said act required and authorized. On January 1st, 1869, it paid to the auditor of the state the sum of ten thousand dollars, and a like sum on the first day of every succeeding quarter year, up to and including January 1st, 1879, amounting in all to more than \$400,000, and tendered to the auditor of state, on April 1, 1879, the like sum of \$10,000. This last named sum the auditor of state refused to receive, but the lottery company was willing to pay the same and all succeeding installments provided for in said act as the same should fall due. The said lottery company also gave bonds, with sureties, as required by said act, which are held by the auditor, for the prompt and punctual payment of the sums required by said act to be paid.

The lottery company has collected and maintained a capital greatly exceeding one hundred thousand dollars, has purchased buildings, established agencies, and made large expenditures in its business and paid heavy charges and losses on

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account of the same, amounting to more than one million of dollars, in the full confidence of the validity of the grant made by said act, and that the same constituted a commutative contract between the lottery company and the state of Louisiana. The said \$400,000 paid into the state treasury by the lottery company has been applied year by year under the appropriations of the general assembly to educational and sanitary purposes.

At the session of the general assembly which began in January, 1879, an act was passed which was approved March 27, the purpose of which was to repeal the charter of the lottery company and make the business authorized thereby unlawful.

Section 1 of this act repealed the act approved August 23, 1868, by which the lottery company was incorporated, and all other laws passed in the interest of the lottery company.

Section 2 declared "that the Louisiana State Lottery Company be and the same is hereby abolished and prohibited from drawing any and all lotteries, or selling lottery tickets either in its corporate capacity or through its officers, directors, stockholders, members or agents directly or indirectly."

Section 3 declared "that whoever shall sell, barter or exchange, give or otherwise dispose of, or offer to sell, barter, exchange, give or otherwise dispose of, directly or indirectly, personally or through an agent or agents, either for himself or others, or shall draw any lottery or have any connection with or interest in the drawing of any lottery in this state, or shall have in his possession within this state, with intent to sell or offer for sale or with intent to barter or exchange, or give or otherwise dispose of any lottery tickets or shares, or fractional part thereof, or lottery policy or combination, device or any other writing, certificate or token, intended or purporting to entitle the holder or bearer, or any other person, to any prize, or share, or interest in any prize drawn or to be drawn in any lottery, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be condemned for each offense to and shall suffer imprisonment in the parish prison or jail, as the case may be, not exceeding sixty

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days, or fined not exceeding one hundred dollars, or both, at the discretion of the court; one-half of such fine to go to the informer, and the other half to the city of New Orleans, or the parish in which said offense is committed, as the case may be."

Section 4 declared "That every person who shall set up or promote any lottery in this state, or shall assist or be interested therein, or shall aid by printing or writing, or shall in any way be concerned in setting up, promoting, managing or drawing of any lottery, or shall in any house, shop or building owned or occupied by him or under his control, knowingly permit the setting up, managing or drawing any such lottery, or the sale of any lottery tickets or share of a ticket, or any other writing, certificate, bill, token, or other device, purporting or intended to entitle the holder, bearer, or any other person, to any prize or share of or interest in any prize to be drawn in a lottery, shall be guilty of a misdemeanor, and on conviction shall suffer imprisonment not to exceed sixty days, or a fine not exceeding one hundred dollars, or both, at the discretion of the court, for each offense, one-half of such fine to go to the informer and the other half to the parish or the city of New Orleans, as the case may be, in which such offense is committed."

The charge of the bill was that this repealing act was an impairment of the obligation of the contract between the lottery company and the state of Louisiana, contained in the act of August 11, 1868, and was in violation of the constitution of the United States, and therefore null and void.

The bill further alleged as follows: "The several defendants are officers of the state, concerned in the enforcement of the laws of the state, without regard to the supreme law of the land, and, unless restrained by order of the court, they will engage in the arrest of every agent, servant, clerk or tenant of the lottery company, and that the machinery of the penal code will be by them set in motion to enforce the said repealing act of March 27, 1879, and destroy the rights of the lottery company under an act of August 11, 1868."

The prayer of the bill was that the charter granted by the

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act of August 11, 1868, to the lottery company, might be established and declared valid, and operative and binding as a contract between the state of Louisiana and the lottery company; that said repealing act of March 27, 1879, might be declared inoperative to impair the force and effect of said contract and charter, or the franchises, rights and faculties therein conferred; that the penal enactments contained in said repealing act might be declared unconstitutional, invalid and inoperative, and that all of the defendants might be enjoined from ordering or allowing any prosecution, arrest or seizure of the plaintiffs or any of their agents or servants, customers or persons in any manner connected with the lottery company for doing or performing or being concerned in any act or acts of the drawing of lotteries or the sale or purchase of tickets of said lottery company, and from interfering with them by prosecution, or otherwise in the doing of any act or carrying out any purpose authorized by the charter of the lottery company.

The case came on for hearing on the motion of the complainants for an injunction *pendente lite*, according to the prayer of the bill.

Messrs. John A. Campbell, Thomas J. Semmes and Joseph P. Hornor, for complainants.

Messrs. H. N. Ogden, attorney-general, and *J. C. Egan*, assistant attorney-general, of Louisiana, for defendants.

Mr. Semmes argued:

1. Lotteries, unless so declared by positive law, are neither immoral nor unlawful. The mere establishment of a lottery is not a matter of absolute right or wrong.

The prohibition of lotteries depends upon the public policy of the state, as enunciated in its laws. The public policy of Louisiana, as thus expressed, was not opposed to lottery schemes until the constitution of 1845. Prior to that time acts had been passed authorizing lotteries for the benefit of an academy, of a lyceum, of a church, and for the opening of canals and repairing of roads.

The constitution of 1864 expressly authorized the vending

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of lottery tickets under certain regulations prescribed by the legislature.

The constitution of 1868 was silent on the subject of lotteries, and left the matter to the discretion of the legislature. When the act incorporating the Louisiana State Lottery Company was passed in 1868, there were laws on the statute book authorizing lotteries to be drawn and lottery tickets to be sold.

These facts are referred to to show that the act of setting up of a lottery or selling lottery tickets is not a thing of itself immoral or improper—not condemned by law or religion or morals.

2. The creation of a corporation by a state legislature, for any purpose not prohibited by the constitution, is a contract between the state and that corporation. The mere franchise to be a corporation is a contract between the state and the corporation: *Dartmouth College v. Woodward*, 4 Wheat., 518.

3. The contract between the state of Louisiana and the lottery company, as expressed in the act of incorporation, was that the company should have a corporate existence for twenty-five years; that it should have the franchise to set up lotteries and sell lottery tickets, and that it should have the exclusive right to do these things for the period aforesaid.

4. A lottery franchise, granted by the legislature, is a valid contract: *Gregory v. Trustees of Shelby College*, 2 Met. (Ky.), 589; *State of Missouri v. Hawthorn*, 9 Mo., 389; *Davis v. Caldwell*, 2 Rob. (La.), 271.

5. Under the act of March 3, 1875, every suit arising under the constitution or laws of the United States, and in which the amount in controversy is over \$500, can be brought in the circuit court, irrespective of the citizenship of the parties.

6. A case involving the construction of a law or treaty, or the constitution of the United States, and which construction becomes necessary to the disposition of the case, is a case arising under the constitution or laws of the United States: *Cohens v. Virginia*, 6 Wheat., 264; *The Mayor v. Cooper*, 6 Wall., 252; *Miller v. The Mayor of New York*, 13 Blatch., 469.

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7. The aid of a court of chancery will be given for the purpose of preventing an unlawful act, though it be also a criminal act, if it has a tendency to destroy the property or business of the complainant: *State ex rel. Slaughter House Company v. Fagin*, 24 La. An., 247; *Louisiana Lottery Company v. New Orleans*, 24 La. An., 86; *Springhead Spinning Co. v. Riley*, Law Reports, 6 Equity, 511; *Dixon v. Holdon*, Law Reports, 7 Equity, 488.

8. A court of equity will enjoin the officers of a state from the execution of an unconstitutional law, where the tendency is to impair the constitutional rights of the complainant: *Osborn v. United States Bank*, 9 Wheat., 738; *Davis v. Gray*, 16 Wall., 203; *Crane v. McCoy*, 1 Bond, 422; *Mason v. Rollins*, 2 Bissell, 99; *Shimer v. Morris Canal and Banking Co.*, 27 N. J. Eq., 364; *Lutes v. Briggs*, 5 Hun. (N. Y.), 67; *Stage Horse Cars*, 15 Abbott, P. N. S., 51; *Brown v. Trustees of Catlettsburg*, 11 Bush., 435; *Cherokee Nation v. The State of Georgia*, 5 Pct., 77; *Williams v. Detroit*, 2 Mich., 560.

9. This bill is not an attempt to enjoin proceedings in a state court, and the injunction asked is not prohibited by section 720 Revised Statutes. Proceedings cannot be stayed until they have been commenced: *Fisk v. The Union Pacific Railroad Co.*, 10 Blatch., 518.

Mr. Ogden:

1. The public policy of Louisiana is opposed to gaming, for the code withholds any action for the recovery of money won upon a bet, except in particular cases where the tendency is directly to promote the material interests of the state.

2. If the act of March 3, 1875, to determine the jurisdiction of circuit courts of the United States, etc., is so construed as to vest the circuit courts with jurisdiction over a suit between citizens of the same state, the act is unconstitutional: Alexander Hamilton, in *The Federalist*.

3. This suit does not fairly come within the provisions of the act of March 3, 1875. It is not a case arising under the constitution and laws of the United States, but of the state of Louisiana. The constitution and laws of the United

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States may be drawn in question in the litigation, but it will not be pretended that they will necessarily be drawn in litigation.

4. This suit is essentially an attempt to remove the criminal proceedings in the state courts to this court for adjudication. It is, therefore, not a suit of a civil nature, to which alone the act of 1875 applies.

5. The injunction prayed for is to stay proceedings in a state court, and is prohibited by section 720 Revised Statutes: *The Supervisors v. Durant*, 9 Wall., 415; *Campbell's Case*, 1 Abbott, U. S., 185.

6. The injunction asked for is against the state district attorney, who has no other functions except to represent the state in proceedings in her courts, and two recorders, who are committing magistrates of the state.

7. No decision can be found to sustain the claim of the complainants to an injunction to stay criminal proceedings in a state court. The case of *Osborn v. The United States Bank*, 9 Wheat., 738, stops very far short of an authority for what is demanded in this bill.

8. The assumption that a police officer can be enjoined in advance from making an arrest, upon warrant, under a general law of the state demanding punishments for crime, strikes down the whole sovereign power of the state.

9. If there be a wrong, the remedy in the case is very simple. The parties arrested have the right to the writ of *habeas corpus* whenever an arrest is made without warrant of law. There is, therefore, no necessity for the exercise of the extraordinary and unprecedented power invoked by the bill.

10. If the injunction prayed for in this case can be allowed, then it ought to be allowed in every other case where a person who expected to be charged with crime appeared and alleged that he would be injured by arrest in his property and rights, and that the arrest would be in violation of the constitution and laws of the United States.

Mr. Egan, on the same side :

1. The sum of \$40,000 required by the charter of the

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lottery company to be paid by it to the state, is not in consideration of the privileges and franchises conferred by the charter, but is in lieu of all taxes and licenses, whether imposed by state, parish or municipal authorities.

2. If the setting up and drawing of lotteries is a lawful business, then the act of August 11, 1868, which confers the exclusive right upon the lottery company to carry on this business in the state of Louisiana for the period of twenty-five years, is unconstitutional and void: *Slaughter-house Cases*, 16 Wall., 36.

3. If a grant of power is in violation of the fundamental law, it cannot be valid in one part and invalid in another: *United States v. Reese*, 92 U. S., 214.

4. The act of August 11, 1878, confers upon the lottery company a mere license to set up lotteries and sell lottery tickets, and does not amount to a contract. The license could be withdrawn, and it would be no violation of a contract to do so: *Burroughs on Taxation*, 148, 149.

5. The inherent right of sovereignty to abate a nuisance cannot be alienated: *Coates v. New York*, 7 Cow., 585.

6. The general power of the legislature to legislate for the protection of the life, health, safety and morals of the inhabitants of the state, cannot be the subject of an irrevocable grant by it: *O'Leary v. The County of Cook*, 28 Ill., 534; *Dingman v. The People*, 51 Ill., 277; *Lowe v. Williams*, 94 U. S., 650; *Moore v. The State*, 48 Miss., 147; *Metropolitan Board of Excise v. Barrie*, 34 N. Y., 663.

7. If arrests are made under the act of March 27, 1879, it can only result in affecting the liberty of the persons arrested, and they have adequate remedy under the laws of the land. No corporation whose rights are remotely connected with the arrests can, by seeking an injunction, paralyze the criminal laws of the state.

Mr. Campbell, for complainants, in reply:

1. The constitution of the United States and the laws of congress sanctioned by it are the supreme law of the land. Every officer of the state legislature, executive or judicial, is

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not only bound as a citizen, but as an officer of the state, to observe that constitution and those laws as supreme.

The constitution of the United States confides to the government of the United States judicial power to decide all cases at law or in equity arising under the constitution and laws of the United States, and the treaties made or to be made under their authority, and the act of congress of March 3, 1875, determines that the circuit courts of the United States shall have original cognizance of all cases of the description mentioned in that clause of the constitution. The jurisdiction conferred by this act is independent of the condition or state of the party to the suit. It depends entirely upon the subject matter or causes of the suit. The test of jurisdiction is and must be some right or claim arising under the supreme law of the land. The jurisdiction comprehends all cases at law or in equity under the article. The power of the government to have the constitution and laws of the United States and their treaties authoritatively expounded and enforced by the courts of its own nomination and appointment, admits of no controversy or doubt, and the act of March 3, 1875, appoints the circuit courts as the instruments to do this. The power of congress to do this has been determined in numerous cases by the Supreme Court of the United States: *Martin v. Hunter*, 1 Wheat., 304; *Cahens v. Virginia*, 6 Wheat., 264; *Osborn v. United States Bank*, 9 Wheat., 738; *Ableman v. Booth*, 21 How., 506; *The Mayor v. Cooper*, 6 Wall., 247.

2. The charter of the Louisiana state lottery company is unquestionably a contract. The charter was not granted as a gratuity, but for a valuable consideration, part of which has been paid and the residue is to be paid.

3. Every concession of a franchise confers rights which cannot be resumed without reservation of power to do so in the grant. It does not belong to the legislature to destroy the concession. It is a contract, the obligation of which cannot be impaired: *Wales v. Stetson*, 2 Mass., 143; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn., 28; *Dartmouth College v. Woodward*, 4 Wheat., 518; *Terrett v.*

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Taylor, 9 Cranch, 43 ; 2 Kent's Com., 306 ; Cooley on Constitutional Limitations, 279.

4. The charter of the lottery company is not a mere revocable license.

A license is usually a permission or authority to do some act in respect to the property or business of another person. If the property be in land, the notion of any estate or right in the land is not conveyed by the use of the word license. The owner may revoke the license. In matters of taxation, the license is usually a receipt for the assessment as paid, and affords evidence that the licensee has performed the demands of the law. In this class of licenses it is held that the licensee cannot complain of any change in the laws on the subject. A licensee is not obliged to use his license, and, generally, any person may obtain one. There is no exclusive right conveyed : *Calder v. Kirby*, 5 Gray, 597.

This corporation is established for a term of years. It is bound to collect capital, which may be divided into assessable shares. There is a continuing payment, to last during the life of the corporation, and an exclusive privilege to run during the same period. All of these legislative acts impose upon the state the obligation of a contract, which a subsequent legislature cannot impair : *Bank of Pennsylvania v. The Commonwealth*, 19 Pa. St., 144.

5. Lottery grants are not an exception to this rule : *State v. Phalen*, 3 Harr., 441 ; *Gregory v. Trustees of Shelby College*, 2 Met. (Ky.), 589 ; *State v. Sterling*, 8 Mo., 697 ; *Freleigh v. The State*, *Idem*, 606.

6. The supremacy of the constitution of the United States is not to be undermined or subverted by any ingenious form of enactment framed for the purpose.

7. Where officers charged with the administration of the criminal law become agents for those who impair the obligation of contracts, or who deprive men of life, liberty or property before a hearing and without process, there is no reason why they should not be restrained by preventive process from the courts : *Osborn v. United States Bank*, 9 Wheat., 738 ; *Davis v. Gray*, 16 Wall., 203 ; *Board of Liquidation v. McComb*, 92 U. S., 531.

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The cases that have been cited show that the power of the court of chancery is co-extensive with the wrongs which property may suffer, and that when there is a possession supported with title, an invasion of that right, in a manner to produce irreparable mischief, under color of a law or right by a public officer, and there is no adequate mode of hindrance or redress, an injunction will issue: *Wood v. Brooklyn*, 14 Barb., 425; *Cherokee Nation v. The State of Georgia*, 5 Peter, 77.

Mr. Ogden filed a supplemental brief, in which he argued:

1. The lottery is gambling on the most extensive scale, and in the most pernicious form, and gambling of every kind has been reprobated by the common judgment of mankind, and must, therefore, be regarded as immoral.

2. The question is whether the action of a legislature, in granting franchises to a body of men proposing the establishment of an immoral business in a community, ties the hands of all succeeding legislatures. Can a valid contract be made by a legislature for the establishment of an immoral business? Are not the right and power to protect the physical and moral health of the people inalienable rights of government? The authorities show that the courts have almost invariably so considered them: *Calder v. Kurby*, 5 Gray, 597; *Metropolitan Board of Excise v. Barrie*, 34 N. Y., 657.

3. That clause of the constitution of the United States which forbids a state to impair the obligation of contracts, has no reference to any such contract as that set up in the bill, but to contracts by which perfect rights, certain definite, fixed private rights of property were vested; contracts as to property, and not involving any question of public policy upon which the police or other great powers of the state could be called into operation: *Butler v. Pennsylvania*, 10 How., 402.

Mr. Campbell filed a brief in reply:

1. The repealing act complained of does not for the first time prohibit lotteries. By the charter of the lottery company and other acts, all other lotteries were prohibited. The repealing act was simply designed to abrogate the charter of

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the lottery company, and prohibit its business in common with all other lotteries.

2. In those clauses of the constitution on which complainants rely, to wit, "No state * * shall pass any * * law impairing the obligation of contracts;" "Nor shall any state deprive any person of life, liberty or property without due process of law," there is no exception or reservation of cases, the prohibition is universal. The inquiry is, therefore, what cases are included in the terms of the prohibition? To ascertain this we must resort to the decisions of the Supreme Court of the United States. The following cases touch this question: *Fletcher v. Peck*, 6 Cranch, 87; *Dartmouth College v. Woodward*, 4 Wheat., 526; *Sturges v. Crowninshield*, 4 Wheat., 122; *Planters' Bank v. Sharp*, 6 How., 301.

3. It is not denied that corporations may be required to conform to such regulations of a police character as the legislature may see fit to impose. There is a distinction between powers conferred upon corporations by contract and such as belong to them as corporations. The latter may be controlled by the legislature, as natural persons may be, but the former cannot be disturbed without compensation.

The following are cases which show what character of regulations the legislature may impose on corporations: *Winona & St. Peter R. R. Co. v. Blake*, 94 U. S., 180; *Chicago, etc., R. R. v. Iowa*, *Idem*, 155.

The following cases show the subordination of police laws of a state to the constitutional commands and prohibitions: *The Passenger Cases*, 7 How., 283; *T. W. & W. Railway Co. v. City of Jacksonville*, 67 Ill., 37; *Thorpe v. The R. & B. Railroad Co.*, 27 Verm., 140; *Commonwealth v. Farmers' Bank*, 21 Pick., 542.

4. The present constitution of Louisiana has a clause pronouncing contracts for the sale of persons to be null and void, and notes given for slave property before the war were annulled by the state courts. But the Supreme Court of the United States overruled these decisions, and held that the law having recognized such a right, and the contracts having

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been made under the laws, they were legal and valid: *Osborn v. Nicholson*, 13 Wall., 661; *Wilmington, etc., R. R. Co. v. King*, 91 U. S., 3.

A similar decision was made in respect to the clause in the constitution of this state, which prohibited a recovery on contracts the consideration of which was confederate money: *Delmas v. Insurance Co.*, 14 Wall., 661; *Wilmington, etc., R. R. Co., v. King*, 91 U. S., *supra*.

5. The cases in Missouri, Kentucky and Delaware maintain that there may be a vested interest in the existence and continuance of a lottery grant which the legislature cannot destroy or abridge. The Supreme Court of Louisiana recognizes the same rule: *Davis v. Caldwell*, 2 Rob. (La.), 271.

6. When an act of incorporation has been accepted and rights have vested, the inquiry is pertinent, whence does the legislature acquire a power to divest them. The franchises and rights granted by the general assembly are not to be revoked at the pleasure of that body, or by any convention assembled to make a constitution. See remarks of Chief Justice Shaw, in *Commonwealth v. Farmers' Bank*, 21 Pick., *supra*. See, also, remarks of Chief Justice Taney, in *Ohio Life Ins. and Trust Co. v. Debolt*, 16 How., 416.

7. The final question is, whether the complainants have made proper parties to the suit. The defendants are those who are immediately implicated in the infliction of injury under the obnoxious law. Has the state armed these defendants with a commission to destroy a contract made by herself, to deprive the complainants of their rights by an arbitrary exertion of power, without process of law, and this in violation of the constitution of the United States? The court is asked to restrain the defendants, and the complainants are told that the mere fact that the state commands is a sufficient answer.

The states having waived the exemption which their sovereignty gave to them from control of the judicial power by their delegation to the courts of the United States, of all cases in law or equity arising under the constitution and laws of the United States, with the grant of authority to hear and deter-

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mine such causes, it follows that to execute their agency all the usual instruments for effectuating the entire adjustment of the controversy accompany the grant.

In respect to cases in which the state is immediately interested, it is competent to sue the agents of the state: *Osborn v. United States Bank*, 9 Wheat., 738; *Chicago, etc., R. R. Co. v. Iowa*, 94 U. S., 155; *Peik v. Chicago, etc., R. R. Co.*, 94 U. S., 165; *Board of Liquidation v. McComb*, 92 U. S., 531.

BILLINGS, District Judge. The complainants have filed their bill in the circuit court of the United States, under the permission conferred in an act of congress, approved March 3, 1875, which vested those courts with "original cognizance of all suits of a civil nature, at common law or in equity, arising under the constitution and laws of the United States, or treaties made, or which shall be made, under their authority:" 18 Stat., 470. The civil jurisdiction of this court was by this statute enlarged to the entire extent of the judicial power delegated to the congress by the terms of the constitution. Prior to this statute the jurisdiction of this court depended, in a great measure, upon the condition or character of the parties, and upon particular laws of the United States; this statute vests a jurisdiction of all cases which may involve the enforcement of the constitution, laws and treaties of the United States in their determination. The jurisdiction thus acquired comprehends suits which the United States or its officers or agents may bring in the discharge of official duty under the constitution, laws or treaties, and such as may be maintained against them because of official acts or obligations. Besides these are embraced the cases between individuals and corporations where the constitution, laws or treaties of the United States shall form the immediate and determining cause of the controversy, and this fact is exhibited to the court in such a form that the court can take cognizance of it. Until the question is so submitted, and is thus made, the judicial power does not attach. Prior to this enactment the powers, which the congress had not bestowed upon the federal courts by legislative provisions, were dor-

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mant because that authority had not designated the tribunal which should be authorized to employ them. This interpretation of this clause of the constitution is announced in *Martin v. Hunter*, 1 Wheat., 304; *Osborn v. United States Bank*, 9 Wheat., 738; *Ableman v. Booth*, 21 How., 506; *Cohens v. Virginia*, 6 Wheat., 264; *The Mayor v. Cooper*, 6 Wall., 247; and *United States Bank v. Roberts*, 4 Conn., 323.

The plaintiff, the Louisiana State Lottery Company, was incorporated in the year 1868 by the general assembly of Louisiana, and was endowed with corporate rights and privileges to be enjoyed for the term of twenty-five years. The bill charges that these were enjoyed without disturbance until the first of April, 1879, under the authority of the act of incorporation. The bill avers that above four hundred thousand dollars have been paid, according to the charter, into the state treasury; that the auditor had refused to accept the payment due on the 1st of April, and there is an offer to make that payment and all others as they become due. The cause of the refusal is the enactment by the general assembly in March, 1879, of a statute which repeals in terms the charter of incorporation, abolishes the corporation and imposes penalties to affect all who should carry on the business which the company had by its charter been empowered to conduct. The coplaintiffs aver an interest in and a right to some of the privileges of the corporation by assignment.

The bill charges that the repealing act impairs the obligation of a contract and divests rights of property without process of law; and that the general assembly has violated the prohibitory clauses of the constitution, and that the officers and agents of the state, who are defendants in the bill, have already commenced to enforce this unconstitutional and injurious statute, so as to threaten irreparable injury.

These facts, thus averred, disclose a case arising under the constitution of the United States.

The Supreme Court of the United States, in respect to the clause of the constitution, embodied in the act of congress determining the jurisdiction of the circuit courts, say: "The power under consideration is given in general terms. No

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limitation is imposed. The broadest language is used. All cases so arising are embraced. None are excluded. How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed. The constitution is silent upon the subject. They are remitted without check or limitation to the wisdom of the legislature (congress):” *The Mayor v. Cooper*, 6 Wall., 247.

The act of 1875 (18 Stat., 470) grants to the circuit courts “original cognizance” of all such cases.

The court say: “A case in law or equity consists of the right of the one party as well as the other, and may be truly said to arise under the constitution or a law of the United States, whenever its correct decision depends upon the right construction of either.” * * * “It is the right and duty of the national government to have its constitution and laws interpreted and applied by its own judicial tribunals. In cases arising under them properly brought before it, this court is the final arbiter. The decisions of the courts of the United States, within their sphere of action, are as conclusive as the laws of congress made in pursuance of the constitution. This is essential to the peace of the nation and to the vigor and efficiency of the government. A different principle would lead to the most mischievous consequences:” *The Mayor v. Cooper*, 6 Wall., *supra*.

A case arising under the constitution having been presented to the circuit court, the question comes up whether the case be one in which the plaintiffs have a title to an injunction. It is not denied that the general assembly did grant the act of incorporation, that a corporation was organized and has existed until the abrogating act of March, 1879, was adopted. It is not denied that the payment of \$40,000, quarterly in advance, was made to the auditor, and that a bond with sureties was given to secure that sum as the charter requires; nor that the required capital has been paid in; nor is there any question that the act of the legislature repealing the charter is the only obstacle to the continuance

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of the corporation ; nor that all the departments of the state government have sanctioned its validity: *The Louisiana State Lottery Company v. Richoux*, 23 La. An., 743 ; Acts of 1875, No. 17 (approved April 3), page 44.

It was decided shortly after the constitution of the United States was made that "the rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute unless a power for that purpose be reserved to the legislature in the act of incorporation:" *Wales v. Stetson*, 2 Mass., 143. The Supreme Court of the United States and the courts of the states have concurred in this opinion with a degree of unanimity which hardly any other opinion has obtained. The settled doctrine of the United States is that the charter of a private corporation is a contract the obligation of which cannot be impaired without an infraction of the constitution of the United States ; that a grant of franchises is, in point of principle, identical with a grant of other property ; whether the consideration be large or small is not essential ; for the motives or inducements which caused the legislature to pass the act cannot be examined to offset the validity of the act. Of the sufficiency of the consideration the legislature is the only competent judge. Every valuable privilege given by the charter, and which conduced to make it acceptable, and to promote an organization under it, is placed beyond the power of the legislature, unless the power be reserved at the time when the charter is granted : *Dartmouth College v. Woodward*, 4 Wh., 518 ; *State Bank of Ohio v. Knoop*, 16 How., 369 ; *Hawthorne v. Calef*, 2 Wall., 10 ; *The Binghamton Bridge*, 3 Wall., 51.

The court is asked by the attorney-general of the state to hold that the contract, if such it be, which has been made by the state on the one part, and the incorporators of the complainants' corporation on the other part, was of no binding force, and could be set aside by the legislature of the state on account of its subject matter, to wit, for the reason that the franchise was for the drawing of lotteries. I have examined with great care the view that has been taken both in the federal and the state courts of the United States as to the

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binding force of contracts made by the legislature upon the subject matter of drawing lotteries. The authorities are overwhelmingly against the position taken by the attorney-general and his associate, and while lotteries are reprobated as having an immoral tendency by the courts, and they have not cast about to strain inferences to uphold grants with reference to them, nevertheless, where the grant of the right to draw lotteries has taken the form of an absolute contract, the courts have treated the responsibility of its creation as resting entirely with the legislature, and have dealt with it as carrying the obligation which its terms import.

I shall first view the grant of plaintiffs as if it were a mere license and independently of the considerations which spring from the fact, that the plaintiffs are a corporation, and afterwards shall show what further inference is to be derived from that fact.

I shall first consider the question with reference to the fact that the plaintiffs had a license granted to them by the legislature for the period of twenty-five years to draw lotteries. In this connection, I find two propositions adhered to with well nigh entire uniformity by the courts of the states and of the United States: first, that a mere license to draw lotteries, which is not inseparable from the essential functions of a corporation, and which has not been acted upon, and under which no rights have been vested, may be repealed by any succeeding legislature of the state in which it is granted, and, secondly, that where a license to draw lotteries has been acted upon, and under it, rights have been vested, it cannot be withdrawn by the legislature to the prejudice of these rights and the power of the legislature to recall or modify it is to that extent gone. In our own state, in the case of *Davis v. Caldwell*, 2 Rob. (La.), 271, the Supreme Court say: "The permission to draw a lottery is not *per se* a contract, and until it has been accepted and rights have been acquired under it, is perfectly within the control of the legislature."

In the state of Missouri the question was very fully discussed in the case of *State v. Hawthorn*, 9 Mo., 389.

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The defendant Hawthorn had been indicted for selling lottery tickets in a lottery for the benefit of the St. Louis Hospital. In 1833 the legislature of Missouri had authorized a sum of money to be raised by a lottery drawn by commissioners. In 1835 an agreement was made between the commissioners and Gregory, by which the commissioners, after reciting the act of 1833, agreed to dispose of the said right of drawing schemes of lotteries, and for the consideration of two and a half per cent on the sales of tickets in that state, transferred to the said Gregory the sole and exclusive right to draw such scheme or schemes.

On the August 23, 1841, Gregory assigned this contract, and his assignee appointed the defendant Hawthorn his agent for selling lottery tickets in Missouri. In December, 1842, the legislature passed an act repealing all laws authorizing the drawing of any lottery, or the sale of any lottery tickets within the state of Missouri, and imposed heavy penalties upon any one violating its provisions. The only question raised in the case was whether this last mentioned act, so far as it affected the present defendant, was contrary to that clause of the constitution of the United States which prohibited a state from passing any law impairing the obligation of contracts. In the lower criminal court the judgment had been in favor of the defendant, and the Supreme Court of Missouri, in affirming that judgment, say: "We are aware that it is at all times a delicate task for a court to question the validity of legislative enactments; it is certainly an unpleasant one where the court feels every disposition to sustain the act whose obvious tendency is to suppress an evil and promote public and private morals. These considerations, however, cannot be permitted to discharge us from the performance of a duty imposed by the constitution, and especially where reason and justice unite with the constitutional prohibition in teaching that a legislature can no more violate a contract made by themselves, or under their authority, than they can rescind or alter or impair the obligation of one made between private individuals."

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In *Phalen v. The Commonwealth*, 1 Rob. (Va.), 713, a license had been granted, in the year 1829, to draw lotteries for the purpose of deriving a certain amount of money for improving the Fauquier & Alexandria turnpike road. The provision originally contained no limit in time and was limited only in amount. In 1834 the legislature of Virginia passed an act declaring it should not be lawful to draw any lottery within the commonwealth after the first of January, 1837, but providing that nothing in the statute should interfere with the contracts already made or with contracts to be thereafter made for the drawing of lotteries, which provision was not to extend beyond the first of January, 1840. The question there was whether the defendants' authority was derived prior to the repealing act, and the court held that it was not. But in considering the question, and with reference to the character of a legislative permission to draw a lottery, the court, at page 724, say :

“A franchise may consist in a personal privilege or exemption, or in rights or privileges connected with personal or real estate, and in the latter aspect it is a species of incorporeal hereditament. The one under consideration may be properly characterized as a liberty or license to effect a particular object by prescribed means, which may or may not at particular periods of its existence, and by reason of the rights and immunities which have sprung from its exercise, give rise to an implied contract, or obligation of preserving it, and guarding it from injurious modifications, or become an element of private property beyond the reach of the power of the government without due compensation.”

In the state of Delaware the legislature had granted a lottery privilege to certain managers, with power to draw lotteries until a certain sum was raised, and a right to sell the grant. The grant had been sold for a valuable consideration and the legislature sought, by a subsequent act, to subject the parties who were vending lottery tickets under the license so assigned to penalties. The superior court of the state of Delaware, in the case of *State v. Phalen & Paine*, 3 Harr., 441, held that the act imposing a penalty and

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attempting to repeal the grant was void. The court, at page 454, say :

“Independent of the constitution of the United States, the act (the annulling act), although clearly contrary to right and incapable of being sustained, yet as an act of a sovereign power may be valid, for it is not always that power regards right, and experience teaches that power unlimited often tramples upon and disregards private right. But when we turn to the clause of the constitution of the United States which appears there inserted as a shield and defense against all legislative action by a state impairing the obligation of contracts, we feel authorized to say not only that the legislature had no right, but they had no power to regulate in the manner attempted by the act of 1841 (the repealing act) the existing contract of 1839.”

And they say : “Hence we are of opinion that the act of the legislature of the state of Delaware of 1841, so far as the same affects the contract of the defendants, made in 1839, purchasing the rights and privileges of drawing a lottery under the act of 1827, is a violation of the latter clause of the tenth section of the first article of the constitution of the United States, and therefore we adjudge and declare the same, in relation to the said contract, void and of no effect.”

In the state of Kentucky the court of appeals, in the case of *Gregory v. The Trustees of Shelby College*, 2 Met. (Ky.), 389, held that the power of the legislature to repeal a grant of a lottery privilege to individuals, and thereby withdraw the privilege, where no rights had been acquired under the act by which it was created, nor any liability incurred in consequence of its passage, was clear and unquestionable, but where vested rights had been acquired under the grant, before the passage of the repealing law, such repealing law must be regarded so far as related to those vested rights as unconstitutional and inoperative. The court say, at page 598 :

“Although the legislature has the power to repeal the grant of a lottery privilege where no rights have accrued

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under it, and though lotteries have a demoralizing tendency and exercise a very pernicious influence over the ignorant and credulous part of the community, and for this reason are almost universally denounced by the law making power in the different states of the Union, yet if rights have been acquired or liabilities incurred upon the faith of the privilege conferred by the grant, it would be obviously unjust to permit such rights to be divested by a legislative revocation of the privilege. If, therefore, any vested rights have been acquired under the present grant, before the passage of the repealing law, then to the extent of such rights at least that law must be regarded as unconstitutional and inoperative."

In the case of *The Commonwealth v. Simmons, Dickinson et al.*, the circuit court in the state of Kentucky, in a decision rendered during the present term, have followed this case of *Gregory v. The Shelby College, supra*.

If we turn now to the Supreme Court of the United States we find that, in the case of *Cohen v. Virginia*, the whole law of the right to review the decision of a state court of last resort in a criminal cause, by the Supreme Court of the United States, was determined and turned upon the question whether a grant by congress of a right to draw lotteries in the district of Columbia had any force beyond that district, and prevented the operation of the criminal law of the state of Virginia in a case where the sale of a ticket had been effected in that state. The whole matter was discussed without an intimation anywhere that the rights of the party before the court, who invoked its power to review, were to be in the slightest degree affected by the fact that his whole exemption was under a grant relating to a lottery.

In the case of *Phalen v. Virginia*, 8 How., 163, which, in the state court, I have referred to as reported in 1 Robinson, the Supreme Court, at page 168, while condemning in strong language the immoral effects of lotteries, says:

"When the legislature of Virginia passed this most salutary act for the suppression of lotteries, they, with commendable caution, protected all vested rights.

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Where, therefore, rights had become vested even under a license to individuals to draw lotteries, according to the settled law of the United States, those rights cannot be disturbed by a mere repealing act of the legislature.

But it is not alone with reference to lotteries and contracts with reference to lotteries that the immorality of the consideration has been invoked. Very many of the states of the Union which had been engaged in the insurrection, after the reconstruction, upon the ground of the immoral and pernicious character of the consideration of such contracts, by provisions inserted in their constitutions, declared all contracts wherein slaves, or the currency of the so-called confederate states was the consideration, should be treated as absolutely void. Those cases went to the Supreme Court of the United States, and that court, looking simply at the declared policy of the state as to the alleged immoral and pernicious consideration at the time the contracts were made, held that the contracts, when made, had the sanction of competent authority, and that the courts must, therefore, enforce them: *Osborn v. Nicholson*, 13 Wall., 654; *Boyce v. Sable*, 18 Wall., 546; *Delmas v. Insurance Company*, 14 Wall., 661; *Wilmington, etc., R. R. Co. v. King*, 91 U. S., 3.

Where rights have become vested, I know of no distinction which would allow states to recede from contracts, or avoid contracts which they have made, more than can individuals. States at all times can and should make advances to higher and still higher ground, with the view of protecting public and private morals. But they owe a duty, not only founded in natural justice but happily enforced by the supreme power of the constitution of the United States, in all their advances to recognize and protect rights which have become vested and obligations to which they have lent their own sanction.

But the objection against the claim of the learned solicitors for the defendants is even more insuperable, which springs from the fact that the repealing law whose validity their line of argument requires them to sustain, strikes, so to speak, at the functional privileges or faculties of a corporation. It is true, as was intimated by the Supreme Court in

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the case of *Boyd v. Alabama*, 94 U. S., 645, that a grant of a privilege to draw a lottery *made to an individual*, where no rights had become vested, was capable of revocation. It may also be true, where, as in the case of *Moore v. The State*, 48 Miss., 147, a corporation is created for agricultural and scientific purposes, that its essential powers and faculties, viewed as a franchise, must be tested by these purposes, and that if a license to draw a lottery is given by a legislature to such a corporation, it may be held and treated as a license granted to an individual as to its revocability, though it cannot be true as seems to be held as a sort of condition of the decision in that cause that a state convention possesses any more authority to impair the obligation of contracts than is possessed by a state legislature. Both are alike subject to the constitution of the United States. But where a corporation has been called into existence by the legislature of a state for a definite object, explicitly declared in the act creating it, and has powers and faculties given to it which are in their nature and operation pertinent to its sole object, and indeed necessary to its very existence; to maintain that the privileges of such a corporation, where there had been no judicial inquiry, and indeed where there was no allegation of ground of forfeiture, could be swept away by a repealing act of the legislature of the state that created it, is to assail well nigh every case decided in the courts of the United States, and of the states which compose them in which the sacredness of charters and of the contracts embodied in them have been adjudicated upon.

It must be borne in mind, that when the thirteen united colonies declared their independence, in their justification of that step, which they put into the form of what is called the declaration of independence, among other reasons which they assigned for their action in thus separating themselves from the king of Great Britain was, "that he had taken away their charters." The sacredness of the charters which emanated from the sovereign was intimately associated in the colonial mind with the administration of a government in which rights should be properly respected and the obliga-

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tion of contracts justly observed. And when the colonies became states, and the states set up their systems of jurisprudence, the idea of the inviolability of the rights of corporations, which were set forth in their charters, whether those charters came from the king or from the legislature, was well nigh immediately and unanimously announced, and has been with equal unanimity adhered to.

Chancellor Kent in his Commentaries, vol. 3, 458, says: "Another class of incorporeal hereditaments are franchises, being certain privileges conferred by grant from government, and vested in individuals. In England they are very numerous, and are understood to be royal privileges in the hands of a subject. They contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant. The government cannot resume them at pleasure, or do any act to impair the grant without a breach of contract."

And, again, vol. 2, 306, he says: "A private corporation, whether civil or eleemosynary, is a contract between the government and the corporators, and the legislature cannot repeal, impair or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation judicially ascertained and declared."

I think this statement of the law, with reference to the franchises or privileges of a corporation, presents the universal American law upon that subject.

In the case of the *Commonwealth v. The Farmers' Bank*, 21 Pick., 542, Chief Justice Shaw has clearly defined that which is inviolable in the grant of corporate existence and corporate faculties, so far as relates to this case.

"It may be conceded," he says, "that an act of incorporation is to be considered to be a contract between the government, on the one side, and those who accept the act and become a corporation and their successors on the other side; and the corporate power granted cannot be revoked or annulled by an after act of legislation, unless a power has been reserved for that purpose, or with the consent of the corpor-

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ation. But, applying this rule practically, it is necessary to consider how far, and to what subjects, this contract extends. It is clearly a stipulation on the part of the government that the corporation shall be and continue a corporation for an indefinite time, or for a term limited in the act, unless sooner forfeited for some cause recognized by existing laws as a cause of forfeiture; that their constitution, organization and mode of action, as prescribed by the charter, shall not be annulled or changed by the legislature; that members shall not be added or removed; that modes of election, expulsion or suspension of members shall not be altered; and that whatever belongs to their organic constitution and action, as bodies politic, shall continue and be determined by the terms of the charter. In addition to which the powers specially granted to them are not to be withdrawn or diminished."

In *Calder v. Kurby*, 5 Gray (Mass.), 597, a permission had been given to an individual to sell spirituous liquors for one year for the sum of one dollar as a license fee. The court held that this was a mere license and therefore revocable by the state. The court, at page 598, say:

"The whole argument of the counsel of the plaintiff is founded on a fallacy. A license authorizing a person to retail spirituous and intoxicating liquors does not create any contract between him and the government. It bears no resemblance to an act of incorporation by which, in consideration of a supposed benefit to the public, certain rights and privileges are granted by the legislature to individuals, under which they embark their skill, enterprise and capital."

Cooley, in his *Constitutional Limitations*, page 279, says:

"Those charters of incorporation, however, which are granted, not as a part of the machinery of the government, but for the private benefit or purpose of the corporators, are held to be contracts between the legislature and the corporators, based for their consideration on the liabilities and duties which the corporators assume by accepting them, and the grant of a franchise can no more be resumed by the legislature, or its benefits diminished or impaired, without the consent of the grantees, than any other grant of property or val-

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uable thing, unless the right to do so is reserved in the charter itself."

Again, at page 577, he says:

"The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter, and they must not, under the pretense of regulations, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise."

If now we turn to the averments of the bill, we find that the franchise which was granted for twenty-five years has been acquiesced in by every department of the state government for eleven years; that a corporation has been formed whose stock, in shares of one hundred dollars, exceeds one hundred thousand dollars; that upon the faith of this grant, for this period of twenty-five years, the complainants' corporation has already paid into the state treasury \$400,000, and has, furthermore, expended upwards of one million dollars, and that the co-complainants claim, by assignment, an interest in the grant.

Here, then, are rights of an extraordinary magnitude, which are completely vested, and which, according to the authorities which announce the settled law, and have been cited above, were beyond the reach of legislative withdrawal, and which remain vested in the corporation, notwithstanding the repealing law.

It remains further for me to consider the rights held by the Louisiana state lottery company, viewed as a corporation, and to ascertain how far the rights which are asserted in the bill are a corporate franchise, and as such absolutely irrevocable.

The determination of the nature and extent of the stipulations and their operation and effect, must be derived from the language of the act of incorporation. If the concessions in the charter do not convey an interest—a property in the

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privileges or franchises, but amount to only a license in fact and confer only a revocable authority, then independently of the rights which had become vested—the plaintiffs have not established a ground for a suit.

A license at common law was revocable if a certain time was not fixed, or if no interest in the property passed. But in this act of incorporation the corporate faculties and privileges, by express words and necessary implication, are vested for a term of twenty-five years. The quarterly payments are to be paid and secured for all that time. The corporation must collect a capital of not less than \$100,000 within a limited period, and might enlarge it so as to amount to \$1,000,000. The powers to make rules and regulations are liberal, and the corporation might do whatever individuals might for its convenience and safety. The conditions impose burdens without any reference to the emoluments to be received, and compel the possession and use of capital.

A license for trading purposes is commonly given to any who comply with the conditions and the term of time as limited, and there are no obligations imposed to perform acts under it. So the ordinary statutes respecting lotteries confer an authority not coupled with any estate or interest for the purpose of raising certain sums of money by the sale of tickets, or of the lottery scheme for some favored object of legislative or public patronage. The act of 1868, on the other hand, constitutes a corporation to continue in being for a prescribed term and then to be dissolved and liquidated. There is a grant of sole and exclusive privileges of an unusual character for the whole term and the precise object is expressed to make of the business a source of revenue for the state, and the corporation is required to pay quarterly, in advance, a sum of money to the auditor. The corporation must collect capital and may issue shares of stock, and is controlled by directors to be chosen under the charter. These are qualities and attributes which do not belong to a corporate body holding by a legislative contract: *State v. Phalen*, 3 Harr., 441; *Gregory v. The Trustees of Shelby College*, 2 Met. (Ky.), 589; *State v. Stirling*, 8 Mo., 697; *Calder v. Kurby*, 5 Gray, 597; *Freleigh v. The State*, 8 Mo., 606.

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A grant having these characteristics cannot be repealed by the legislature: *Bank of Pennsylvania v. Commonwealth*, 19 Pa. St., 144; *State Bank of Ohio v. Knoop*, 16 How., 369.

The repealing act of 1879, then, is not operative to take away the privileges and rights of the Louisiana state company. The American authorities are adverse to the legislature having any such right.

Not only do the qualities which are impressed upon the corporation by its charter and the faculties given to it under that charter make that instrument when construed by admitted principles a contract, but a succeeding legislature has in terms expressly declared it to be such.

In act No. 17, approved April 3, 1875, at page 44, the legislature of Louisiana says:

“An appropriation to the board of administrators of the charity hospital of \$100,000 for the support and maintenance of the said institution, payable as follows: From the annual revenues received from the Louisiana state lottery company, which are hereby transferred to the charity hospital—\$40,000—provided that the contract made between the state and the Louisiana State Lottery Company shall not in any manner be affected or impaired by the transfer.”

The question of right having been established as well as that of the wrong committed by the enactment, the question remains to be considered whether the existence and enjoyment of these franchises and rights of the plaintiffs can be protected by the use of the writ of injunction.

It is urged by the attorney-general that the prohibition of the Revised Statutes, section 720, which is section 5 of the act of 1793 (1 Stat., 334), which prohibits courts of the United States from staying by injunction proceedings in any court of a state should prevent this court from granting an injunction in this cause. The case of *The Supervisors v. Durant*, 9 Wall., 415, is cited. In that case all that was decided was that “it (the question presented in that case) was not a question as to which court first obtained possession of the case.” Because, the effort having been in that case to restrain, as a proceeding in a state court, a *mandamus* to levy a tax to satisfy a

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judgment obtained in a United States court, it was held that the circuit court having already rendered judgment could not be restrained from collecting it, that the question, therefore, did not turn upon priority of jurisdiction.

In *Live Stock Association v. Crescent City Co.*, 1 Abb. U. S., 388, Mr. Justice Bradley, after quoting this section, and giving it as a reason for refusing an injunction so far as related to suits already instituted, granted an injunction against "commencing or prosecuting any other suits than such as were then pending," and against "suing for any fine or penalty imposed," etc.

In *Fisk v. The Union Pacific Railroad Co.*, 10 Blatch., 518, Judge Blatchford holds that the provision that "a writ of injunction shall not be granted to stay proceedings in any court of the state," has application only to such proceedings in the state court as had been commenced before the federal jurisdiction attached. He gives two reasons for this conclusion. (1) That this restriction must be construed along with the provision of section 14 of the act of 1789 (1 Stat., 83); that "the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions;" and (2) that if the federal courts had not power to restrain parties from thereafter instituting proceedings in a state court, a defendant could in many ways defeat the jurisdiction and action of the federal court after it had obtained full jurisdiction of the person and of the subject matter. I see no answer to this reasoning.

This prohibition of the statute does not stand in the way of complainants obtaining this writ if their case entitles them to it. The question becomes the broad one whether, according to the established principles of equity jurisdiction, they can lay claim to the writ.

A large capital exists for employment and was collected under terms of the contract. Without protection from the strong hand of their antagonists this capital cannot be longer employed and those rights must be abandoned. The purpose of the state is to destroy the corporation and to resume its corporate franchises. The combination, strength and per-

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sistent purpose of a police force controlled by the state and city authorities, unless checked by the power of the court, would necessarily be irresistible. If that force be employed in derogation of rights secured by the supreme law of the land, the charge in the bill that the act would be tyrannical and oppressive is established. The Supreme Court of the United States has said, in a less aggravated case, "Moral obligations never die. If broken by nations or states, though the terms of reproach are not the same with which we are accustomed to describe the faithlessness of individuals, the violation of right is not the less:" *Dodge v. Woolsey*, 18 How., 331. It is certain that this case, if occurring between individuals, would authorize the interposition of a court of equity. Where a party, under color of title, proposes to inflict irreparable mischief, and the recovery of damages is inadequate or uncertain, and the protection of the specific right is a surer mode of doing justice, an injunction will issue: *Bonaparte v. Camden R. R. Co.*, Raldrin's C. C., 205, 233.

This tribunal should interfere to defend the franchise of a corporation from an invasion, though disguised in form and to be effected through state officers clothed with statutory power: *Osborn v. United States Bank*, 9 Wheat., 738.

A court of equity will protect an exclusive right from those who attempt to participate in the profits: *Livingston v. Ogden*, 4 Johns. Ch., 48. The legislation of the congress and the jurisprudence of the United States have applied this remedy with great freedom to support and sustain rights which have been held under statutes. In the adjustment of claims under treaties or laws of the United States, injunctions are allowed to keep the money secure till the title is settled: *Clark v. Clark*, 17 How., 315.

The statutes in respect to patents and copyrights confer equity jurisdiction in accordance with which inventors and authors may secure the fruits of their inventive powers. In some cases injunctions are allowed against the United States; and there are cases in which the United States have obtained injunctions, to defend its own right, from the circuit courts:

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United States v. Duluth, 1 Dill., 469 ; *United States v. Canal Co.*, 4 Dill., 601 ; *New Orleans v. United States*, 10 Pet., 622.

The case of *The Emperor of Austria v. Day and Kossuth*, 3 Degex, F. & J., 217 (64 English Chy.), is an instructive one upon this subject. Kossuth, with a view to continue his war with Austria for the dominion of Hungary, prepared in England an enormous number of notes signed by him in the name of Hungary, which he proposed to introduce for circulation, as money, into that kingdom. There was a motion before the Lord Chancellor and the Lord Justices of Great Britain for an injunction. Lord Justice Turner, speaking to the question of jurisdiction, says: "I agree that the jurisdiction of this court, in a case of this nature, rests upon injury to property, actual or prospective, and that this court has no jurisdiction to prevent the commission of acts merely criminal or merely illegal, and which do not affect any rights of property ; but I think there are here rights of property quite sufficient to found jurisdiction in this court. I do not agree to the proposition that there is no remedy in this court, if there be no remedy at law ; and still less do I agree to the proposition that this court is bound to send a matter of this description to be tried at law. The highest authority upon the jurisdiction of this court, in enumerating the cases to which the jurisdiction of this court extends, mentions cases of this class, where the principles of law by which the ordinary courts are guided, give no right, but, upon the principles of universal justice, the judicial power is necessary to prevent a wrong and the positive law is silent."

The principle laid down is that where the law in principle acknowledges that there is a wrong and there is no adequate or specific remedy, an injunction may be obtained.

The cases cited from the reports of the Supreme Court of the United States are pregnant with significant meaning upon this subject.

The state of Ohio enacted that a branch of the bank of the United States was established and had continued its operations in that state contrary to a law of that state, and that, if it continued to do so, it must pay an annual tax of \$50,000.

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An injunction was allowed by the circuit court of the United States. In that case, as in this, the authority of the court to hear the cause or to grant the relief was challenged. On appeal, the Supreme Court answered: "They could perceive no ground on which the proposition can be maintained, that congress is incapable of giving the circuit courts original jurisdiction in any case to which the appellate jurisdiction extends." This is the answer that the Supreme Court gave to the suggestion that judicial power, in such cases, must first be exercised in the tribunals of the state and not in the courts of the United States. The same court, in the same case, determined the principles of equitable jurisdiction in such cases. The court say: "Injunctions are often awarded for the protection of parties in the enjoyment of a franchise, but the defendants deny that one was ever granted in a case like this; although the precise case may never have occurred, if the same principle applies the same remedy ought to be afforded. The interference of the court in this class of cases has most frequently been to restrain a person from violating an exclusive franchise by participating in it. But if, instead of a continued participation in the privilege, the attempt be to disable the party from using it, is not the reason for the interference of the court rather strengthened than weakened?

* * * The same conservative principle which induces the court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases trespass, and in many cases destruction, will, we think, apply here:" *Osborn v. United States Bank*, 9 Wheat., 738.

The same state of Ohio, at a later period, passed laws to cripple the operations of her own banks and introduced into the state constitution provisions contrary to the conditions and contracts embodied in their charters. The circuit court of the United States in Ohio allowed an injunction upon the officers of the state from enforcing the state enactments; and the Supreme Court of the United States says "that the jurisdiction of chancery extends to inquire into and enjoin, as the case may require to be done, any proceedings by individuals in whatever character they may profess to act, if the subject

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of complaint is an imputed violation of a corporate franchise or the denial of a right growing out of it, for which there is not an adequate remedy at law:" *Dodge v. Woolsey*, 18 How., 331.

One of the objections answered was that it is contrary to sound policy that the collection of the state revenue should be arrested by the instrumentality of a writ of injunction issuing from the circuit court of the United States.

The bill of the plaintiffs in this suit shows the undisguised purpose of the general assembly of the state to denude the corporation not only of franchise, right and privilege, but of corporate existence, and that, too, contrary to the precise and definite language of the act of incorporation. This was attempted to be done by the mere fiat of the general assembly without any regard to the forms or processes of law. The general assembly did not seem to have called to mind that there were constitutional limitations, both state and federal, upon their omnipotence. Besides this they engrafted upon the act, so as to carry out their purpose of destruction and to give effect to the sections which breathe extermination, penal enactments. All of the acts, agencies and instruments for conducting the business which the corporation was formed to conduct under the legislative guarantees and sanctions are made criminal and stigmatized as misdemeanors if maintained or done. The general assembly did not appear to have heard the voice of the constitution of the state under which they were convened, which commanded that no law impairing the obligation of a contract should be passed; nor the more commanding tones of the people of the United States forming the American Union, that no state shall pass such a law, nor deprive any person of life, liberty or property, without due process of law.

The Supreme Court of the United States have said: "There is no more important provision of this constitution than the one which prohibits states from passing laws impairing the obligations of contracts. And it is one of the highest duties of the federal tribunals to take care that the prohibition shall be neither evaded nor frittered away. Complete

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effect must be given to it in all its spirit:" *Murray v. Charleston*, 96 U. S., 432.

The act No. 44 which repeals the act passed in 1868 for the establishment and organization for a term of twenty-five years of a corporation for which a price was stipulated and has been paid, and which arbitrarily abolishes the charter and prohibits the business it was established to conduct, in the light of the decisions of the Supreme Court of the United States and of this state, must be pronounced to be inoperative and without authority; that the corporation is not abolished, nor its rights, privileges and franchises resumed by the state. The relief prayed for in the bill is due the plaintiffs.

The question remains, have the plaintiffs a title to ask a restraining order upon the defendants?

The defendants to a bill like the present one cannot have any estate or interest in the subject-matter, to wit, the rights and franchises of the corporation in possession or expectancy which a decree can affect. The purpose of the legislative act complained of is purely destructive. The agencies selected to execute it are those of mere force. They are commanded to crush out the rights and privileges without any honoring of the bounds of property, though the constitutions of both the Union and the state may surround it. The state is not amenable to any suit, and is shielded by the immunity from any process or legal responsibility. But as an unconstitutional law has no inherent force either to authorize or protect, and, therefore, no claim to be obeyed and no authority to divest rights, the agents of its administration, of whatever name or character, may be called to answer and are individually responsible. The cases of this sort are numerous: *Davis v. Gray*, 16 Wall., 203; *Board of Liquidation v. McComb*, 92 U. S., 531.

The affidavits filed show that the police officers are the selected ministers for this purpose. Notwithstanding the fact that a hearing of this motion was ordered, these agents were afterwards active, and had made arrests prior to the restraining order and the hearing. The officers of the state

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plainly contemplated the use of this force. The bill charges it, and these affidavits supply the corroborating proofs.

The argument on behalf of the state claimed for this force an authority and an exemption beyond what they are entitled to. This immunity or exemption from all responsibility to the court for acts done in divesting rights of property, and in disregard of the obligations of contracts under a violent law of the state, is apparently a fort which the defendants hope successfully to maintain.

Writers on equity jurisdiction properly say that the court of chancery does not deal with matters of crime, misdemeanors, offenses against prohibitory laws, nor questions of mere morality. But there is this reservation, that it is only when those matters are not connected with rights of property with respect to which the court has jurisdiction. Circumstances may confer a jurisdiction: *Attorney-General v. Cleaver*, 18 Vesey, Jr., 211; *Macaulay v. Shackell*, 2 Bligh, N. S., 96.

In *Springhead Spinning Company v. Riley* (L. R.), 6 Eq., 558, the vice-chancellor says:

“The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or to make it less valuable for use or occupation.”

In the case of *Osborn v. The United States Bank, supra*, the prayer of the bill was to restrain Osborn, an officer of the state of Ohio, from executing a law of that state, made for the great oppression and wrong of the complainants, and to the destruction of rights and privileges conferred on them by their charter, and by the constitution of the United States. The Supreme Court said: “The true inquiry is, whether an injunction can be issued to restrain a person who is a state officer from performing any official act enjoined by statute, and whether a court of equity can decree restitution if the act be performed.” Assuming that the act of the legislature of Ohio was unconstitutional, the question was whether the plaintiffs were entitled to relief in a court of equity against the defendant and to the protection of an injunction.

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The court answered that the legislature of Ohio had passed a law for the avowed purpose of expelling the bank from the state, and had made it the duty of the defendant (the auditor) to execute it as a ministerial officer. The law, if executed, would unquestionably effect its object, and would deprive the bank of its chartered privileges, so far as they were exercised in the state. The application to the court was to interpose its writ of injunction to protect the bank, "not from the casual trespass of an individual who might perform the act threatened, but from the total destruction of its franchise, of its chartered privileges, so far as respects the state of Ohio."

The *gravamen* of the bill was the invasion of the chartered rights of the bank, derived from the laws of the United States, under color of a warrant from the state of Ohio, directed to its officer for the precise purpose of destroying those rights.

Would the remedy have been changed if the legislature of Ohio had made it a crime or misdemeanor to establish or maintain the bank, or for one of its officers to perform any function in its behalf whatsoever?

The chartered rights and privileges held under the constitution and laws of the United States were, in either case, the objects to be destroyed. In either case the constitution and laws that established them were to be subverted and frustrated. In both cases there was the right to protection from the same court, because there was no other court fully adequate to afford a remedy.

The case last cited is in all respects analogous to the case before this court. There is no dissimulation nor concealment in respect to the purpose of act number forty-four. The act is framed for the single purpose to revoke the rights and privileges granted to the plaintiffs, and to resume the control over them, although the charter was designed to confer upon the corporation these rights. If that charter contains a contract, as to which there can be no rational doubt, the nullity of that repealing act is made manifest. Whenever any constitution or law of a state comes in conflict with

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the supreme law of the land, that constitution or law must yield.

The case may be briefly stated thus: The constitution has prohibited any state from passing any law impairing the obligation of contracts, and has delegated to the federal judiciary the authority to enforce this prohibition; this authority has, by the congress, so far as relates to cases of property, been assigned to the circuit courts. Is the prohibition to be evaded and the jurisdiction declined because the forbidden law of the state, while subverting rights of property, seeks to give overwhelming effect to such subversion by placing the execution of the law in the hands of the criminal officers? If this be true, so far as relates to preventive justice, it must be equally true of remedial justice in the federal tribunals. It would follow that the prohibitory provision of the constitution could, so far as relates to any real remedy for injury to property, be evaded, and the constitutional check rendered unavailing at will by any state. Can this be so? Is not the principle as stated in *Osborn v. The United States Bank (supra)*, by the Supreme Court conclusive of this case as of that? The court there said: "The counsel for the appellants are too intelligent, and have too much self-respect to pretend that a void act can afford any protection to officers who execute it," and cannot, not only the principle which the court in that case enunciate, but the very language which they employ, be adopted as equally decisive of this case as of that, when they say: "The circuit court of the United States has jurisdiction of a bill brought by the United States for the purpose of protecting the bank in the exercise of its franchises, which are threatened to be invaded under the unconstitutional laws of a state; and as the state itself cannot, according to the eleventh amendment to the constitution, be made a party defendant to a suit, it may be maintained against the officers and agents of the state who are intrusted with the execution of such laws."

The officers of every state of the United States, whether executive or judicial, owe to the constitution of the United States a fealty, an homage, an obedience, surpassing that which they owe to their constituents of the state. The

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people of the United States, composed of all the peoples of the separate states, have adopted the constitution, and have ordained that the terms of that instrument and the laws and treaties made pursuant to it, shall have obedience, anything in the constitution or laws of any state to the contrary notwithstanding: *Gibbons v. Ogden*, 9 Wheat., 1; *Dodge v. Woolsey*, 18 How., 331.

The supremacy of this constitution, from the very frame of the government, in cases like this before the court, must be maintained by the courts of the United States. The judicial power was organized so that controversies arising under the constitution and laws, which assumed a judicial form, should, in some cases, originally, and in all cases, finally be determined in the courts of the United States, in order that in every state the constitution and laws should be understood and obeyed in the same manner: *M'Culloch v. Maryland*, 4 Wheat., 316; *Ableman v. Booth*, 21 How., 506.

The court acquired jurisdiction of this cause on the first day of April, 1879, by the filing of the bill and by a motion made upon notices served on the same day on defendants for the allowance of a restraining order preliminary to an application for an injunction. The court made an order upon that day. The defendants, or some of them, afterwards, on the 5th day of April, obtained warrants of arrest in the name of the state, the precise purpose of which is to destroy the rights and privileges which were granted in the act number twenty-five of 1868, described in the bill, and to anticipate and defeat the effect of any restraining order or writ of injunction.

The power of a court of chancery to restrain persons subject to the jurisdiction of the court, and parties to a cause pending before it from taking proceedings in other courts, whether domestic or foreign, to defeat the ends of such proceedings, is indisputable. The power rests upon the fact that every court has an authority to defend its jurisdiction and to restrain persons subject to this authority from acts calculated to defeat it. An assignee of an insolvent estate may obtain an injunction upon a creditor who shall send to

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another state and attach property of the insolvent so as to obtain a priority. So a court may restrain a corporation from making a surrender of its charter while it is a defendant, the object being to defeat the suit: *Fisk v. The Union Pacific R. R. Co.*, 10 Blatch., 518; *Dekon v. Foster*, 4 Allen, 550.

Nor is there anything in the fact that a defendant is an officer and supposes he is performing an official duty which would constitute a reason for withholding the exercise of this jurisdiction. The jurisdiction is conservatory, and is employed where a wrong is attempted under color of law, and with an appearance of right, to inflict permanent and incurable mischief. The remedies at law are, in general, adequate to defend persons from violence and lawlessness. The unoffending citizen is entitled to be protected by the state through its punitive laws. But when the state itself errs and its legislature visits, by a law, constantly recurring penalties upon all the officers and agents of a corporation, it gives rise to a question of the rightfulness of the law, viewed in its operation upon franchises—upon property. For, since a corporation is an artificial being, and can only act through its representatives, any law which forbids, under penal sanctions, every conceivable corporate act of officers and agents, must assail the value and existence of its privileges, and if that law be unauthorized, its operation may be restrained and the property, which is by the constitution exempted from its power, may be protected by the proper process of the courts: *Wood v. City of Brooklyn*, 14 Barb., 425; *Frewin v. Lewis*, 4 Myl. & Cr., 249.

The states may define crime, affix penalties, arraign and punish those who commit the prohibited acts. Where there is no right of property involved, the circuit courts have no jurisdiction to deal at all with any criminal process of a state, however void may be the law from which it emanates. Such case can be submitted to the constitutional tests only by being brought from the state court of last resort before the Supreme Court of the United States. But in a case which, as does this, involves the right of property, in which an inva-

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sion of those rights is sought to be effected through processes based upon a law of a state, void, because unconstitutional, it makes no difference whether the void law is found in a criminal or civil code, or whether the process which is sought to be made the instrument of injury bears the seal of a police magistrate or the signature of a state auditor. Both are void because resting upon a prohibited and void law of a state. Those who issue and use them may be sued at law for damages, and in proper cases of equitable jurisdiction those who threaten to use them may be restrained by injunction. In the case of *Cohens v. Virginia*, *supra*, the Supreme Court held that the restraining power of the constitution could be exerted through that court in civil and criminal causes, and upon states in their efforts to pass civil or criminal laws which were prohibited. In matters as to which jurisdiction is confided to the circuit courts, namely, in civil causes, the jurisdiction is equally comprehensive so far as relates to the character of the state laws, and is necessarily established by the same reasoning. It is true the review by a writ of error to the state court of last resort would defeat the unconstitutional law so far as an authoritative declaration of guilt or innocence was concerned; but would afford neither redress nor protection so far as the plaintiffs' rights of property are concerned. The jurisdiction of the circuit courts in the cases included in the statute commences where the invaded rights of property commences and only ends where they end.

The case is a peculiar one. The circuit courts of the United States have original cognizance of all cases in law or in equity arising under the constitution of the United States. This jurisdiction was granted that rights—civil rights—arising under the constitution should be protected, not only ultimately, but also in the first instance, by the courts of the United States.

No suit or suits, which can be brought at law, will secure protection to the plaintiffs.

The mischief will be permanent and irreparable unless there be a relief in equity.

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The party that originates the wrong is exempt from the jurisdiction of the court.

Unless jurisdiction in equity be obtained, then the supreme law is defeated and its provisions frustrated.

The constitution has already enjoined the state from committing the wrong by impairing the obligation of its contract. But this injunction is defied, and we are told that because the infliction of the injury is done in the name and by the direction of the state there can be no inhibition nor restraining order. To hold this would be to subordinate the constitution of the United States to the authority of a legislative act, and to disregard the great mandate of that constitution which commands that "the judges in every state shall be bound thereby, anything in the laws of any state to the contrary notwithstanding."

The motion for injunction *pendente lite*, as prayed for, must prevail.

Ordered accordingly.

EASTERN DISTRICT OF TEXAS.

GALVESTON, MAY TERM, 1878.

D. G. HITCHCOCK & Co. v. THE CITY OF GALVESTON.

Demurrers were filed in the circuit court, on various grounds, to the petition of the plaintiff, and were sustained by the court. The cause was taken by writ of error to the Supreme Court, by which the judgment of the circuit court was reversed and the cause remanded. *Held*, that the defendants should not be allowed to file, in the circuit court, further demurrers to the plaintiffs' petition.

This cause was heard upon the motion of plaintiffs to strike out certain demurrers, filed by the defendant, to the petition of plaintiffs.

At the December term, 1874, the cause had been heard upon demurrers, based on various grounds, filed by the defendant to the petition. The demurrers had been sustained by the circuit court on two grounds, and the petition dismissed. See *Hitchcock & Co. v. The City of Galveston*, 2 Woods, 272. The cause was carried to the Supreme Court of the United States, on writ of error, and the judgment of the circuit court was reversed and the cause remanded. The Supreme Court held that none of the demurrers were well taken. See *Hitchcock v. Galveston*, 96 U. S., 341.

After the case came back to the circuit court the defendant filed other demurrers, alleging other causes of demurrer. The plaintiffs moved to strike out the newly filed demurrers. The case was heard upon this motion.

Mr. F. Charles Hume, for the motion.

Messrs. W. P. Ballinger and George Flourney, contra.

BRADLEY, Circuit Judge. The petition in this case, as amended from time to time, was dismissed by the circuit

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court, on two grounds: *First*. Because the contract for paving the streets of Galveston, made with the plaintiffs, was upon the condition precedent that they should obtain the written consent of the owners of the property fronting and abutting upon the sidewalks to be paved; and that the whole contract was an entirety, and did not contemplate grading, filling or curbing separate from paving; and that the petition contained no allegation that this condition precedent had been performed, and hence alleged no cause of action. The Supreme Court held this position to be erroneous, declaring that the contract was severable, and that the condition precedent related only to the paving; and, as the petition only claimed damages for the breach of the contract so far as it related to grading, filling and curbing, the petition should not have been dismissed for this ground.

The other ground on which the circuit court dismissed the petition was that the contract provided for the payment of the work in bonds to be issued by the city, having the character of negotiable instruments. The circuit court held that the city had no authority to issue such bonds, or to agree to do so, and therefore the contract was without authority. The Supreme Court decided that the dismissal of the petition on this ground was also erroneous; for, conceding that the city had no authority to issue such bonds (and whether it had or not the court did not decide), still, as the city had power to pave the streets, and to contract for that purpose, the contract might be valid in every respect, except as to the manner of payment; and, if the payment in bonds was not authorized, the plaintiffs would not be precluded from their rights to recover on their contract. The court say: "If payment cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force so far as it is lawful." Again: "The corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it can not object that it was not empowered to per-

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form what it promised in return, in the mode in which it promised to perform:" *Hitchcock v. Galveston*, 96 U. S., 341.

Besides deciding that the dismissal of the petition was erroneous, so far as related to the grounds on which it was placed by the circuit court, the Supreme Court felt bound to go further and inquire whether the demurrers presented any other grounds on which the judgment of the circuit court could be sustained. The court, therefore, examined with considerable care the points made with regard to the validity of the contract as depending upon the power of the city to make it, and the authority of the officers through whose agency it was made. The conclusion reached on this subject was, that the city had full power to make the contract, so far as the grading and paving was concerned, and that the officers were sufficiently authorized; and, if not, that the contract was abundantly ratified by the council after it was entered into.

This is all that has been decided in the case, and it may be recapitulated as follows: First, the petition sets out a valid contract on the part of the city of Galveston, in all respects, except perhaps the agreement to issue bonds in payment of the obligation incurred by it. Second, this contract is severable as between the parts that relate to paving and those relating to grading, curbing and filling; and the condition of obtaining the consent of the property owners does not relate to the latter. Third, the plaintiff's action is based on the latter portion of the contract, relating to the grading, curbing and filling; and they set out a sufficient breach of the contract, in that regard, on the part of the defendant to show a cause of action. Fourth, therefore the petition should not have been dismissed.

Some points raised by the demurrers to the petition are not decided by the judgment of the Supreme Court. First: Whether the defendants had a right to issue bonds, and to contract for so doing. This was decided by the circuit court in its previous judgment, but was regarded by the Supreme Court as immaterial on the question of dismissing the petition and was not passed upon. The former opinion of the

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circuit court will be adhered to, and the question will not be considered as open for further argument here. Second: Whether the plaintiffs are entitled to recover profits for that portion of the contract which was not performed. Third: What will be regarded as the measure of damages, both for work done and for profits on work not done, should it be held that profits are recoverable.

These points are still open for discussion, although it may be contended that they are inferentially decided by the judgment of the Supreme Court. I do not think that the defendants should be allowed to file any further demurrers to the petition. They had already demurred and answered three times before the case was taken to the Supreme Court. I think it would be an abuse of the right of amendment to allow any further demurrers to be filed. In the first place, it would be out of the order of pleading, inasmuch as a full answer had already been made to the facts; and, in the second place, it would be an abuse of the manner of pleading calculated to draw after it very inconvenient consequences. After the parties have gone to the highest court upon the validity of the petition, the court should examine with much jealousy any attempts to change the pleadings in the case. It would encourage speculation upon the opinion of the Supreme Court. There ought, some time or other, to be an end of raising legal objections. I think that end properly came in this case when the cause went to the Supreme Court. I have no doubt that it will be found that every material point of defense can be presented on the trial of the cause under the points which have been raised.

An order will be made to strike out all demurrers filed to the petition since the cause has been remanded from the Supreme Court.

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HENRY HOUSER v. W. T. CLAYTON AND A. HEIDENHEIMER.

1. Where, in an action of trespass brought in a state court, the defendant justifies the alleged trespass under the authority of a court and of the laws of the United States, the case is removable to the federal court under section 2 of the act of March 3, 1875 (18 Stat., 470), as a case arising under the constitution or laws of the United States.
2. Where such case has been removed to the federal court on the ground that it is one arising under the constitution or laws of the United States, that court will confine the defendant substantially to the ground of defense which he indicated in his petition for removal.
3. Where a petition for the removal of a cause from a state to a federal court, under section 2 of the act of March 3, 1875, *supra*, alleged as ground of removal that there was in the suit a controversy between the plaintiff who, when the suit was brought, was an alien, and the defendant, who was a citizen of the state where the suit was brought: *Held*, that the ground alleged was sufficient, and that the fact that the plaintiff, after the suit was brought, had become a citizen of the United States, did not prevent the removal of the cause.
4. The petition for the removal of a cause from the state to the federal court, may be amended.
5. The act of March 3, 1875, *supra*, does not require the petition for removal to be verified; it is nevertheless eminently proper that it should be.
6. Said act does not require that the order for the removal of the cause should be made before appearance by defendant.

This was a suit brought in the district court for the county of Galveston by Henry Houser against W. T. Clayton and A. Heidenheimer, to recover damages for an alleged trespass by unlawfully entering the house of the plaintiff in Galveston, searching the same in a rough and violent manner, and terrifying his family. On the 12th day of February, 1878, the defendants filed a petition to remove the cause to the circuit court of the United States for the Eastern District of Texas, which petition was accompanied by a bond as required by law. By leave of the court subsequently given, the petition for removal was amended, and the amended petition was filed on the 16th of March, 1878, and set forth as cause for removal two several grounds. First, the petitioners stated that the defendant Clayton, in committing the alleged trespass, was acting in his official capacity as deputy marshal of

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the United States for the district aforesaid, in the execution of a warrant issued by the district court of the United States, commanding the marshal to search for and seize any mercantile property of one Samuel Levine, in the house in question, being the common residence of said Levine and the plaintiff, and Levine having been adjudicated a bankrupt by the said district court of the United States at the instance of Heidenheimer and other creditors; and that Heidenheimer was a mere attendant of Clayton, assisting him in making said search. The petition alleged that the said district court of the United States had jurisdiction in the premises under the bankrupt laws of the United States, and that the defendant Clayton, as such officer, was acting under its authority. The petition set forth a copy of all the bankruptcy proceedings, containing amongst other things a copy of the warrant referred to in the petition.

As a second and additional ground for the removal of the cause, the petition alleged that the plaintiff, at the time of filing the suit, was an alien, and not a citizen of the United States, but a subject of the emperor of Austria, and that the defendants were citizens of Texas.

The petition as amended was duly verified by the oath of the defendants.

The court accepted the petition and bond, and made an order for the removal of the cause, and the same was removed accordingly.

Messrs. T. M. Jack and John T. Harcourt, for plaintiff.

Messrs. J. Z. H. Scott and A. N. Mills, for defendants.

BRADLEY, Circuit Justice. The plaintiff moves to remand the same on the ground that the causes of removal were insufficient. The plaintiff, in support of the motion to remand, contends that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court.

That the petition for removal was insufficient, presenting no legal ground for removal;

That the amended petition was unauthorized by law;

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That the order for removal was made on a day subsequent to the appearance of the defendants ;

That the petition and exhibits attached thereto are variant and contradictory ;

That at the date of the amended petition the plaintiff was a citizen of Texas.

It was stated by the plaintiff, in certain exceptions filed in the state court, that he obtained his naturalization as a citizen of the United States after the commencement of the suit, and before the filing of the amended petition.

We think that the motion to remand the cause cannot be granted. In our view, either of the causes of removal set forth in the petition was sufficient.

First. The defendants justify the alleged trespasses under the authority of a court of the United States, and under the laws thereof. This presents a case arising under the laws of the United States, and is within the terms and meaning of the second section of the act of congress approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States," etc. (18 Stat., 470). Such a defense set up in a suit in the state court, and overruled there, would clearly entitle the defendants to carry the case, by writ of error, to the Supreme Court of the United States, both under the 25th section of the old judiciary act, and under the act of 1867, passed in lieu thereof. But the only ground on which it could be thus made reviewable by that court, is that it is a case "arising under the constitution or laws of the United States ;" and if it is such a case, then it is removable to the circuit court of the United States under the second section of the act of 1875, *supra*.

It may be objected to this view, that it does not appear that the defendants will adhere to the justification set up in their petition for removal, when the cause shall proceed in the circuit court of the United States ; that, when there, they may elect to adopt some other defense. But as this would be a fraud upon the court, and upon the course of justice, after having obtained the removal of the cause on that ground, the circuit court will take care that they shall be

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held to this defense, and will not permit them to plead any other. Should they attempt to set up another defense, independent of that on which they have obtained a removal, it will be the duty of the court to strike it out, and to confine the defendants to substantially the ground of defense which they have indicated in their petition—not perhaps to the literal statement of it, but to that which is substantially the same.

The second ground of removal, namely, the alienage of the plaintiff and the Texas citizenship of the defendants (which also arises under the second section of the act of 1875), is also sufficiently alleged in the petition. It is true, the petition only alleges that the plaintiff was an alien when he filed his suit in the district court for Galveston county, and does not allege that he still remained an alien at the time of filing the amended petition for removal. But we think the allegation was sufficient. It was lately decided by the Supreme Court in the case of *Insurance Company v. Pechner*, 95 U. S., 183, that, under the judiciary act of 1789, the requisite citizenship for the removal of a cause from a state court to a federal court must exist at the commencement of the suit in the state court. It is true, the court drew its conclusion from the language of the 12th section of the judiciary act, which was, "that if a suit be *commenced* in any state court by a citizen of the state against a citizen of another state," etc., then the cause might be removed; and the language of the act of 1875 is different, and is not so explicit on this point. But we think that the intent of the act is the same. Its language is, "That any suit of a civil nature at law or in equity, now pending or hereafter *brought* in any state court, * * in which there shall be a controversy between citizens of a state and foreign states, citizens or subjects, etc., either party may remove said suit," etc. The description here given of a suit that may be removed embraces a suit in which the parties have the requisite citizenship or alienage at the time of its commencement; and as that was the time fixed by the previous law for ascertaining this condition or status of the parties, it may very

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properly be construed to be the time intended by the present law for the same purpose. It is convenient to have some fixed and definite time. The commencement of the suit is the most convenient and reasonable time. If a subsequent time were fixed, it would involve a necessary shifting and changing of jurisdiction. We shall adhere to the old rule as within the intendment of the present law until some other rule shall be adopted by the superior court.

The formal objections to the removal of the cause are not tenable. There is no good reason why a defendant should not be allowed to amend his petition, if by inadvertence it is imperfect as first presented. It is contended that it cannot be amended in so important a matter as that of being verified by affidavit, where the original petition is not so verified; in other words, that the original must be considered as no petition. We do not perceive why this result should follow. The statute does not require a verification, though it is eminently proper that the petition should be verified.

It is said that the order of removal was made on a day subsequent to the appearance of the defendants. The act of 1875 does not require that the order should be made before appearance. It only requires that the party desiring a removal shall make and file a petition therefor "before or at the term at which said cause could be first tried, and before the trial thereof." (Section 3.)

Without going into further detail, we may say that no sufficient ground has been pointed out for remanding the cause.

The motion is overruled.

L. EDGERTON & DOANE ET AL. V. H. A. GILPIN, SURVIVING.
PARTNER OF L. BELDEN & CO. ET AL.

1. The fact that some of the defendants in a cause pending in a state court are citizens of the same state with the plaintiff, is not an obstacle to the removal of the cause to the federal court, if such defendants are merely formal and not necessary parties.

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2. Where a cause had been removed from a state court to a federal court and had been pending and proceeding there, the removal acquiesced in for a number of years, and all objection to the jurisdiction of the federal court had been obviated by amendment: *Held*, that the cause would not be remanded to the state court on account of any irregularities in its removal.

Heard upon motion to remand cause to the state court from which it had been removed.

Mr. T. N. Waul, for the motion.

Mr. E. J. Davis, *contra*.

BRADLEY, Circuit Justice. This case was commenced in the state district court of Nueces county, in December, 1867, the complainants being three business firms of New York, and the defendants being a business firm in Nueces county, Texas. The suit was an equity suit, brought to procure the sale of certain real estate in Nueces county, and certain claims against different parties, which had been assigned by the defendants to one Charles Russell, as trustee, to secure to the plaintiffs, and to one other business firm of New York, certain debts due to them by the defendants. The plaintiffs prayed for a sale of the property to satisfy these debts. The three plaintiff firms were L. Edgerton & Doane, Gardner, Green & Co., and Reid, Sprague & Co.; the other firm interested with them in the same trust was Lane, Banks & Co. The defendant firm was F. Belden & Co., to whom was added as defendants, Russell the trustee, and the firm of Lane, Banks & Co., who did not join in the suit. The latter firm was added merely because they had an interest in the property sought to be sold. They were not served with process except by publishing a citation, and they never appeared in the cause. Russell did not appear, having, as alleged, emigrated to Mexico, and has since deceased. The real defendants, having any interest in the cause opposed to the plaintiffs, were the firm of F. Belden & Co., consisting of F. Belden, then deceased, and H. A. Gilpin, who was surviving partner of Belden, and administrator of his estate, appointed thereto by the county court of Nueces county. Gilpin was duly

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served with process, and defended the suit. Mauricia A. Belden, widow of F. Belden, was subsequently made a party.

After various proceedings in the case, the plaintiffs, in October, 1869, applied to remove the cause into the circuit court of the United States for the Eastern District of Texas, on the ground that from prejudice and local influence they would not be able to obtain justice in the state district court. This application was made under the act of March 2d, 1867, amendatory of the act of July 27th, 1866, relating to the removal of causes.

The application for removal was first made by motion, supported by an affidavit, on the 16th of October, 1869. The motion, as filed, alleged that the plaintiffs were citizens and residents of the state of New York. The affidavit stated that they were of the city and state of New York, and that they had reason to believe that from prejudice and local influence they would not be able to obtain justice in the state court.

The motion was opposed by the defendants by exceptions filed on the 19th of October, 1869, on the ground, first, that Lane, Banks & Co., of New York, were defendants; secondly, that the acts of March 2d, 1867, and of July 27th, 1866, had not been complied with; thirdly, that the plaintiffs had not filed a petition, as required by the act, etc.

The next day, the 20th of October, 1869, the plaintiffs filed a regular petition for the removal of the cause, alleging that they were citizens of the United States, and of the state of New York, and that the defendants were citizens of the state of Texas; that the matter in controversy exceeded five hundred dollars, and they referred to their previous affidavit, motion and bond already filed, and prayed for a removal of the cause. This petition was not verified by affidavit, but was only signed by the attorneys of the plaintiffs. But its statements as to the citizenship of the parties have never been denied.

This petition was not acted on by the court for more than a year, during which time further proceedings were had in the cause, namely, the appointment of a receiver to take charge

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of a portion of the property, who, however, was subsequently discharged.

The application for removing the cause was again presented to the court on the 25th of November, 1870, and was then heard, and an order of removal was made by the court, and the cause was transferred to this court, and has ever since progressed here.

After the removal of the cause, the plaintiffs, to avoid the objection to the jurisdiction of this court, arising from making the firm of Lane, Banks & Co. defendants, dismissed their bill as to them.

Subsequently, in September, 1877, in order that the pleadings and proceedings might be in conformity to the forms of pleading and proceeding in equity in this court, the plaintiffs filed an amended and supplementary bill, making only the said Gilpin, surviving partner and administrator of F. Belden, and Mauricia, his widow, defendants; and therein alleging the citizenship of themselves and of the defendants, the one of New York, the other of Texas. To this bill the defendants appeared, and filed answers, and the cause has been going on since in this form.

Now, after the cause has proceeded for seven or eight years in this court, the defendants move to remand it to the state court for the irregularities before referred to.

We have made this statement, as furnishing a better argument than any other that could be made, to show that it would be unjust and oppressive to grant this motion. The parties have acquiesced in the removal for years, and have been proceeding with the litigation of the cause in this court without objection. Every ground of objection to the jurisdiction of this court has been removed. We think the parties are entirely estopped from moving to remand at this stage.

The only point that would have required special consideration at any time is, whether the fact that Lane, Banks & Co. were made defendants in the cause, they being citizens of New York, the same state of which the plaintiffs are citizens, would have precluded its removal. But they were made defendants nominally, because they did not choose to join the

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plaintiffs in bringing the suit, not being willing, probably, to incur any costs on the subject. They were not necessary parties. They could have been cited to prove their claim before the master without being made parties. I do not think that the making of them formal parties changed the character of the suit, as a suit between citizens of New York on one side, and citizens of Texas on the other. They were the only real litigants in the cause. It was really and truly and only a litigation between them, and we should have been inclined to think that the cause was properly removed, at the time it was removed, notwithstanding this objection.

But, in view of the course which the cause has taken, we think that, if the objection could have been properly urged, it has ceased to be a ground of objection to the jurisdiction of this court.

The motion is overruled.

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1. According to the Spanish law, as interpreted by the courts of Texas, assisting witnesses are not necessary to the validity of final titles, extended by alcaldes and commissioners to make sales.
2. The fact that such document is written on unstamped paper is not fatal to its validity.
3. A grant purporting to convey land lying within the limits of a colony will be void if the land in fact lies outside such limits, unless the officer extending the title and the grantee acted in good faith and with reasonable ground to believe that the land was actually situated within the colony.
4. According to the jurisprudence of Texas, a defendant in an action of trespass to try title, who has pleaded not guilty, and has also, in pleading the statute of limitations, set up title in himself, is not precluded from showing the invalidity of the plaintiff's title.

In this case the intervention of a jury was waived, and the issues of fact as well as law submitted to the court.

Messrs. W. P. Ballinger, T. M. Jack and M. F. Mott, for plaintiff.

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Messrs. A. H. Willie, C. F. Cleaveland and Prior Lea,
for defendant.

MORRILL, District Judge. Plaintiff's title is a *testimonio* issued by Jose Jesus Vidawri, a commissioner of Power and Hewitson's colony, dated November 20, 1834, to four named persons jointly, calling for a league of land fronting on Colet's creek and boundaries described, and a conveyance to himself by two of the four grantees.

Defendants' answer is:

1. Not guilty.
2. Statute of limitations and occupancy of the land by virtue of their titles and adversely to plaintiff.

Defendants also excepted to the sufficiency of the title of plaintiff, because:

1. It was not written on stamped paper.
2. It had no attesting witnesses.
3. The land described did not lie in Power and Hewitson's colony.

Since most, if not all, of the questions raised by the parties in this case have been adjudicated, either by the Supreme Court of Texas or of the United States, or both, the several points raised will be disposed of by reference to the cases in which the decisions have been made.

In *Clay v. Holbert*, 14 Tex., 189, it was decided that assisting witnesses were not essential to the validity of the acts of possession extended by alcaldes and commissioners in cases of sales, etc. The object of such witnesses was to authenticate the act so that it would prove itself. In the absence of them the genuineness of the document must be proved according to the general principles of evidence.

In *Jones v. Montes*, 15 Tex., 351, the court disposed of the case relating to the want of stamp paper in the same manner as for want of witnesses. In both cases it was decided that assisting witnesses and the stamp went to establish the authenticity or genuineness of the document offered in evidence, and that the want of faith or credit that would arise

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by the want of the witnesses of assistance and stamp-paper could be established by other testimony.

Though this court can not fully appreciate the conclusiveness of the reasoning of the Supreme Court of the state, yet, as the decision relates to, and adjudicates upon, a local law, it must be regarded by this court as if it were a part and parcel of the statute.

The next exception to the *testimonio* is, that the land lies outside of, and beyond the boundaries of Power and Hewitson's colony; that the commissioner had no authority to grant it, and that the grant is void.

That the conclusion would certainly follow if the premises are true, has been decided, not only in Texas, but in the Supreme Court of the national government, as well as in other states: *Mason v. Russell*, 1 Tex., 721; *White v. Burnley*, 20 How., 235; *M'Lemore v. Wright*, 2 Yerger, 326.

In *Hamilton v. Avery*, 20 Tex., 612, it was held that where part of a colonial grant lay within the colony and part without, and the boundary of the colony was well defined, that the grant was void as to the part lying beyond the limits of the colony, the commissioner having no authority to extend titles to land outside of the colony.

The testimony in this case shows that there have been two boundary lines run showing the northern boundary of Power and Hewitson's colony. One of these was run by White, in October, 1834, and the other by Richardson. It further appears from the maps introduced and other testimony, that the nearest portion of the grant, under which plaintiff claims, is a half of a mile outside of and beyond the colony boundary as run by White, and upwards of five miles of the one as run by Richardson. And if we are to be governed by the decisions of the Supreme Court, as appears in *Mason v. Russell*, or *Hamilton v. Avery*, *supra*, we should be compelled to declare that the title of plaintiff is null and void.

But the plaintiff refers to *Hamilton v. Meniffee*, 11 Tex., 718, and contends that the principles decided therein, if applied to the plaintiff's grant, would sustain its legality.

As this is a leading case, and as all other cases involving

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the subject-matter refer to this case as authority, and more particularly as the court, in its decision, necessarily discussed, and virtually decided upon, the boundaries of Power and Hewitson's colony, which is now before this court, it will be necessary to quote, and somewhat extensively, from the opinion of that case.

The facts in the case were, that one Buentello applied for a "grant" to the governor of the state; that all the usual preliminaries had been complied with, and that the alcalde of Goliad, on the 28th of July, 1833, decreed that, in consequence of the land having been declared vacant and not pertaining to any person or corporation, and finding it without the literal leagues and within the limits of his municipality, that the designated land be surveyed and title issued. It further appears that afterwards the same land was granted to Dona Dolores Carabagal by Power and Hewitson's colonial agent. The suit was instituted to test the comparative merits of the titles. The Buentello survey lay, mostly, between the two lines run by White and Richardson. If, therefore, White's line was the true line, most of the survey would be in the colony, and if Richardson's line was the correct one, most of it would be beyond the colony. In giving their opinion the court say:

"It seems that the authorities of the municipality of Goliad, the surveyor and the grantee, were confident that the land was without the coast leagues.

"It would be an act of great injustice to permit titles, fairly and honestly granted, with reference to a line of boundary not traced by the government, but honestly determined upon by the authorities on the best lights which they had on the subject to be impeached, because they are two or three miles within or without what may now be supposed to be the exact line.

"We are of opinion, therefore, that a variation of two or three miles from what may now be determined upon to be the exact line should not defeat titles, if, when issued, they were supposed to be in conformity to the line, and which, on fair principles, can not be deemed to have been located or

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deeded in wanton disregard and in violation of the laws imposing restrictions on titles in the territory embraced by such line.

“The mode of running a line adopted by Richardson, as we understand it, is one sufficiently accurate. Adopting this line as the best adapted for the definition of the limits of the grant of Buentello, except a small portion being without such line, it is good, in itself, for all parts without the line. White’s line was not run till October, 1834.”

Such are the quotations from the opinion of the chief justice, and which have been substantially followed in other cases. In *Ledyard v. Brown*, 27 Tex., 393, the court say:

“We think it could hardly be seriously urged that a title issued in good faith and within the limits in which the officer issuing it was accustomed to exercise his jurisdiction, and within the limits to which he might reasonably have concluded his authority extended, should be declared void upon the ascertainment of the fact, years afterwards, that it was a short distance beyond his colonial limits.”

Again, in *Elliot v. Mitchell*, 28 Tex., 105. “If the conclusion may fairly be drawn that the commissioner and grantee might reasonably believe that the lands were within the limits of the colony, the grant must be sustained.”

From these opinions there can be no difficulty in adjudicating upon the merits of the case now before this court. It is beyond doubt that White’s line was run in October by the order of Vidawri. On what day in October does not appear, but if it was on the last day it would then be twenty days previous to the issue of the title under which plaintiff claims. Vidawri, then, must have known that the land was beyond the limits of the colony when he made the grant on the 20th of November, afterwards. Even without this positive knowledge that the land was beyond the colony limits of ten leagues, it seems, from the opinion herein before quoted, that it was so considered by the community at large. The very fact that Buentello, an old citizen of the country, who could have obtained his land as a colonist of Power and Hewitson, as well as from the alcalde of Goliad, applied to

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the alcalde instead of the colony, and the fact that the public authorities who issued this grant extending, as it did, at least five miles nearer the divisional line than the land now under consideration, furnishes, itself, strong testimony to rebut the presumption that the title was "fairly and honestly granted," and that it was "honestly determined upon by the authorities on the best lights which they had on the subject."

It may be further added from the fact that it does not appear that two of the parties to whom the "grant" was issued have ever attempted to claim the same, and that one of them has come into court as a witness, and testified that he knew nothing of the grant till more than four years after it was issued, and till he had obtained his land by virtue of the laws of the republic of Texas; from the fact that no one of the four of the grantees ever signed a petition for the land, there is good ground to infer that the grant was issued without the request or knowledge of the grantees.

From the fact that the boundaries of the land set forth in the grant do not call for any object in any corner or any line, notwithstanding the map shows that one of its lines crossed a large creek, and the testimony shows that the tract was heavily timbered, and from the additional fact that there is no report of a surveyor relative to the land, as is issued in such cases, there is good reason to believe that there never was such a survey.

From all the facts in the case, I can come to no other conclusion than that the land was at least five miles beyond the real boundary of the colony, and that the commissioner Vidawri had reason to believe, both from the general opinion of the people, and from the surveyor appointed by him to run the line, that the land was not in the colony when he issued the title, and that the defendants were not guilty of any trespass upon plaintiff's land, and that his title is a nullity.

The plaintiff has assumed, in argument, the position that because the defendant, in addition to the plea of "not guilty," has pleaded a special title in himself, that the defendant is precluded from showing the invalidity of plaintiff's

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title, and refers to *Custard v. Musgrove*, 47 Tex., 217, to sustain this position.

I have carefully examined that case, also *Shields v. Hunt*, 45 Tex., 426, and *Rivers v. Foote*, 11 Tex., 662.

None of these cases decide the position assumed, but, on the contrary, in the case relied upon by plaintiff, *Custard v. Musgrove*, the chief justice states, "the rule to which plaintiff refers" may not apply to a claim of title under the statute of limitations, which is required by law to be specially pleaded.

In this case the defendant pleaded the statute of limitations in addition to the plea of "not guilty," and, therefore, the position assumed does not apply.

Finding and judgment for defendants.

D. G. HITCHCOCK V. THE CITY OF GALVESTON.

1. Under article 1442, Paschal's Digest of the Laws of Texas, where a contract alleged to have been made by a city was executed by its mayor, the plea of *non est factum* need not be sworn to by the mayor.
2. In such a case, where the act of the mayor is questioned, the plea is properly sworn to by members of the common council, and an affidavit made by them to the best of their knowledge and belief, is sufficient.
3. Under the jurisprudence of Texas, the party making a charge of fraud must point out, at least in general terms, the acts upon which he relies to sustain it.
4. An agent or officer may have authority to make a contract, and yet be guilty of fraudulent collusion with the other party in making it. The terms of the contract, and all the circumstances of its negotiation and execution, and the conduct of the parties before and afterwards, may be examined for the purpose of proving such fraud.
5. The fact that the profits to be derived from a contract are very large, is no reason why they should not be recovered. Where the profits are unreasonable and unconscionable, that fact may be an indication of fraud in procuring the contract. But where the contract is established against all charges of fraud or other assaults on its validity, it is entitled to all the legal consequences and incidents of a valid contract.

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6. A city ordinance authorized the mayor and chairman of the street committee to contract for grading and paving certain specified sidewalks, but directed them first to advertise for bids for the work. *Held*, that the advertisement calling for bids was a condition precedent to the making of a valid contract.
7. Under said ordinance an advertisement for bids, signed by the mayor, but not by the chairman of the street committee, is sufficient.
8. *Bona fide* contractors ought not to be prejudiced by too nice and critical a construction of an advertisement for bids, or because it is vague and general.
9. The advertisement for bids for grading and paving certain sidewalks declared, "All the above work is to be done and executed in accordance with the specifications of the city engineer, now on file in this (the mayor's) office." *Held*, that the fact that there were no such specifications on file, then or at any other time, did not affect the authority of the mayor and chairman of the street committee to make a contract for the work.
10. Where the contract itself required the work to be done according to the specifications on file, and none were on file, but the contract itself specified the materials, and there was a common and well-known process of doing the work: *Held*, that the contract was not void for uncertainty, and the contractors might proceed to do the work in the usual and ordinary way, or refuse to perform the work for want of specifications, and seek damages for the non-fulfillment of the contract in that respect.
11. A contract for filling and grading sidewalks is not void because at the date of the contract no grade for the sidewalks was established.
12. A city ordinance authorized the mayor and chairman of the street committee to proceed to have sidewalks constructed in front of the lots of those owners who, for sixty days after notice to do so, failed themselves to construct such sidewalks. *Held*, that without such notice and failure, the officers had no authority to contract for the construction of said sidewalks.
13. Where a contract entered into between the officers of a city and contractors, imposed a more rigid condition on the contractors than was required by the ordinance by which the contract was authorized to be made: *Held*, that this did not avoid the contract; if the contractor consented, the city could not object.
14. The fact that the contract did not conform to the advertisement for bids, did not make it void, provided the contract was within the scope of the ordinance which authorized it.
15. The fact that a contract has been vacated and a new one adopted in its place, is a good defense to an action on the original contract.

This cause was heard upon the demurrers of the plaintiffs to several of the answers of the defendant. The substance

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of the answers demurred to will appear in the opinion of the court.

Mr. F. Charles Hume, for plaintiffs.

Messrs. Wm. P. Ballinger and *George Flourney*, for defendants.

BRADLEY, Circuit Justice. The first point raised on this demurrer is to the 6th plea of the original answer, which denies that the contract was the contract or deed of the defendant, the inducement or reason of the plea being that the mayor of the city, and the chairman of the committee on streets and alleys, who executed it, had no lawful authority to make and execute the same. It is contended that this plea should be supported by an affidavit, under article 1442 of Paschal's Digest. But it is evident that this article cannot be literally enforced where the defendant is a corporation; for a corporation cannot make an affidavit. And as the mayor is one of the officers whose act is questioned, I think the affidavit was properly made by a member of the common council. It is still objected that they only swear to their best knowledge and belief. But from the nature of the case, this was all they could properly swear to. Besides, it was held, in *Compton v. Stage Co.*, 25 Texas (Supp.), 67, that where the denial is to the authority of an agent to execute the deed, no affidavit is required. This demurrer, therefore, is overruled.

The next question raised by the demurrer is to the plea that the contract was obtained by fraud on the part of the plaintiffs, being the seventh plea in the original answer. It is objected that this plea is too general, and does not apprise the plaintiffs of the matters intended to be relied on as proof of fraud, or of the acts in which the fraud consisted.

At the common law the plea of fraud is allowed to be general, as shown by Chitty on Pleading. But in equity, as a general thing, the specific acts of fraud must be shown; for fraud is there commonly set up as a ground of specific relief, such as the setting aside of a contract, etc., and hence the court requires that the complainant shall apprise the defendant of the specific grounds on which the charge of fraud is

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made, in order that he may have the benefit of his answer thereto.

I infer from the cases cited from the Texas reports, that, in this state, the equitable rule is followed. Of course it cannot be expected that the party charging fraud can give all its details, for it is of the very nature of fraud to cover itself up with as much concealment as possible, and the details by which it is effected are more in the knowledge of the party who has committed a fraud than in that of the party who has been victimized by it. Nevertheless, the party making the charge must point out, at least in general terms, the acts on which he relies to sustain it. The defendants, in the present case, insist that they have done this by the several amendments to their answer. An examination of these amendments shows that they have, in fact, specified a number of facts which they insist are either direct acts of fraud, or are convincing proof that there was fraudulent collusion between the plaintiffs and the officers of the city who made the contract. Without attempting to specify all the acts relied on, the following may be cited by way of example: The defendants charge that the ordinances passed by the common council on the subject of paving the sidewalks, were not, in good faith, followed and observed either in advertising for proposals, preparing specifications, fixing the grade, notifying property owners to pave in front of their lots, or in framing the contract entered into with the plaintiffs; but that in each of these particulars there was a fraudulent departure from the ordinances—a departure calculated to defraud the city and the property holders, and to throw into the hands of the plaintiffs a most unconscionable advantage, with an option to do all the work, or only a part of it, as might be most profitable to themselves. The specific way in which these departures were made is pointed out; and, as a further proof of fraud, it is stated that the profits to be realized by the plaintiffs from the contract, and claimed by them, are grossly exorbitant and unreasonable, exceeding a hundred per cent on the outlay which the work would require. And it is distinctly charged that the plaintiffs suborned persons to make

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bogus bids for the work, at high rates, so as to make it appear that the plaintiffs' bids were reasonable and moderate; and that by the suppression, or failure to furnish information as to the specification of the work, and the grades to be followed, other persons who might and would have bid therefor, were deterred from so doing.

It seems to me that these specifications of proofs and acts are sufficient to sustain the plea of fraud as a pleading. Whether the proof, on the trial, will sustain the allegations, or will be sufficient to warrant a finding of fraud by the jury, is another question, with which I have nothing to do. I think, with these amended averments, the plea of fraud has ceased to be demurrable, and that the defendants may, if they can, set up a defense under it.

This demurrer, therefore, must also be overruled.

The considerations already referred to will dispose of the objections made to several other portions of the defendants' answer, which, if not sustainable as distinct grounds of defense, may, nevertheless be regarded as admissible when considered as specifications of proofs and acts of fraud under that general plea. To this class may be referred the allegations, that no specifications of the work to be done were ever made or filed in the mayor's office, and that no grade was established by the city engineer; and that no specifications, estimates or computation of the amount of work and material necessary to the construction of the sidewalks was made by him, or obtained by the mayor or chairman; that the contract was not in conformity to the advertisement for proposals; that the work contemplated by the advertisements and the contract would have exceeded all the provisions made by bonds or otherwise for the payment thereof; that the advertisements were so framed as to require bids for the entire work in bulk; and, in general, all the allegations of the answer which are made for the purpose of showing that the contract was fraudulently procured by the plaintiffs, or fraudulently and collusively entered into by the officers of the city who negotiated and executed the same.

At the same time, all allegations made for the purpose of

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showing that the mayor and the chairman of the committee on streets and alleys, had no authority to enter into the contract by virtue of the charter and ordinances set out in the pleadings, and the advertisements for proposals must be regarded as overruled by the decision of the Supreme Court. The court had all these ordinances and advertisements before it, and duly considered the same, and came to the conclusion that such authority existed. The demurrer must be sustained, therefore, as to all those allegations of the answer which attempt to show a want of such authority.

But although an agent or officer may have unquestionable authority to make a contract, he may be guilty of fraudulent collusion with the other contracting party in making it; and it may be void, and not binding on his principal, by reason of such fraud. And the terms of the contract, and all the circumstances attending its negotiation and execution, including the conduct of the parties before and afterwards, may be examined for the purpose of evincing and proving such fraud.

It is, therefore, true that many of the allegations of the answer may be admissible as showing proofs of fraud on the part of the plaintiffs, and of the officers by whom it was negotiated, which would not be admissible as grounds for showing a want of authority on the part of the said officers to make it. This distinction must be constantly borne in mind in considering the several portions of the answer which are demurred to. So far as they are put forward as instances or evidences of fraudulent practice, they are admissible, for even if they should severally be insufficient by themselves to demonstrate fraud, yet, as circumstances, they may contribute to that accumulation of proof which is necessary to demonstrate it. If clearly irrelevant to the issue, of course they would be demurrable. But it is often very difficult, in a case of this kind, to say that this or that fact alleged can have no bearing on the question.

Guided by this general principle, it will not be difficult to designate those portions of the answer which are bad on demurrer and those which are sustainable.

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The first plea contained in the amended answer, filed February 20th, 1875, and extending to folio 164, inclusive, on page 47 of the printed record used in the Supreme Court, is overruled.

The second and third pleas contained in the same amended answer, and occupying the residue thereof (except so far as the said third plea questions the authority to make said contract), are sustained, being in fact amplifications of the plea of fraud.

In like manner, all the allegations contained in the amended answer, filed on the 29th day of May, 1878, for the purpose of showing that the mayor and chairman of the committee on streets had no authority to make the contract in question, are overruled; but all of said allegations, made for the purpose of showing that the said contract was fraudulently made are sustained.

The allegation with regard to the notorious previous character of the plaintiffs is overruled, as evidence of that fact would not be competent, having no relation to this case. The allegation with regard to their insolvency is sustained, because that is a circumstance which would be competent on the question of fraud, if no security was required from them for the fulfillment of their contract.

The plea that there was a novation or change of the contract agreed upon by the parties as reported to, and adopted by the common council on the 28th of March, 1874, is allowed to stand. If such a new contract was in fact made, as distinctly alleged by the defendant, and was afterwards repudiated by the plaintiffs, as also alleged, it would undoubtedly be a valid defense to this suit.

As to the question of the right of the plaintiffs to recover profits, which they lost by reason of the defendants' refusal to go on with the contract—which question was originally raised by the defendants' demurrer to the original petition, and which is now again presented by the present demurrer—my opinion is, that if the contract is good, valid and binding on the defendant, there is no reason why the ordinary consequences of such a contract should not follow. It is a settled

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rule of law that if a party to a contract is prevented from performing it by the other party thereto, he is entitled to recover as well such damages as he actually sustains as the profits which he would have realized. The loss of such profits is a part of the damage which he sustains. The expected benefits of the contract are his property. If the answer contains a plea denying the right to recover such profits, it is equivalent to a demurrer and must be overruled. When expected profits are unreasonable and unconscionable, that fact may be one of the evidences of fraud in procuring the contract. But when the contract is established against all charges of fraud and other attacks upon its validity, it is entitled to all the legal consequences and incidents of a valid contract.

The only other question that occurs to me, as presented by the demurrer, is that relating to the measure of damages, as depending upon the agreement to pay for the paving in city bonds. I deem it unnecessary to decide whether such bonds would or would not have been valid. This is not a suit on the bonds, but on the contract. The parties negotiated the contract on the supposition that the bonds would be valid; that the city had power to issue such bonds. It is clear, therefore, under the decision of the Supreme Court, that the measure of damages must be the value of the bonds which the plaintiffs were entitled to receive on the supposition that the bonds would have been valid. This is the measure of value which the parties had in view, and on which their minds met.

I think that these conclusions cover all the material points raised by the demurrer, and an order will be made in accordance therewith.

At a subsequent day of the term Mr. Circuit Justice Bradley delivered the following opinion, which is more full upon the questions presented by the demurrers:

The parties not being able to agree upon the form of judgment to be entered upon the opinion recently given by me in this case, and having desired me to review certain portions of that opinion, I have accordingly re-examined the case as

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submitted to me, and am convinced that I did not take an entirely correct view of the scope and effect of the judgment rendered by the Supreme Court. As the defendants, in their answer, filed December 16th, 1874, had spread upon the record the ordinances, Nos. 21, 26 and 37, under which the mayor and chairman of the street committee derived their power to make the contract in question; and as the plaintiffs, in their amended petition, had also spread the same ordinances on the record, it occurred to me that the question, whether these officers had pursued their authority under said ordinances in making the contract must have been impliedly, if not expressly, decided by the Supreme Court. But a more careful examination convinces me that I was mistaken. The plaintiffs had, in their original and amended petitions, relied on a subsequent ratification of the contract by the common council; and the Supreme Court, after deciding that the city had power to construct the pavements in question, and, if necessary, to incur a debt therefor; and that the common council could and did authorize the mayor and chairman of the street committee to execute a contract for that purpose, without inquiring whether this authority had been strictly followed, held that a ratification had been sufficiently alleged for the purpose of sustaining the petition, thus leaving the other question undetermined, as not being necessary to the case.

Inasmuch, therefore, as the defendants deny the fact of ratification, the door is still open for them also to deny that the contract was made in conformity to the ordinances; for, if the ratification should not be sustained by proof, the authority conferred by the ordinances will become material. It is necessary, therefore, to examine the answers in this aspect of the case.

The points raised by the answers in this regard may be generalized as follows:

First. That the mayor and chairman of the street committee did not advertise for bids and proposals as required by the ordinance of August 19th, 1873, before assuming to make the contract.

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Secondly. That no specifications were ever made by the city engineer as referred to in the advertisement that was made, and in the contract itself, and hence the contract was void.

Thirdly. That no grade was established by the city engineer when the advertisement was made, nor when the contract was entered into; and that the power to establish such grade could not be conferred upon the engineer.

Fourthly. That no notice was given to the property holders to do the work, as required by the third section of the ordinance of August 19th, as amended by that of October 21st.

Fifthly. That the contract contained provisions repugnant to the ordinances, and did not pursue the terms thereof.

Sixthly. That the contract did not correspond with the advertisements that were made.

I will take up these points separately.

First. As to the want of an advertisement for bids or proposals. The ordinance of August 19th, 1873, in authorizing the mayor and chairman aforesaid to make contracts for grading the sidewalks therein specified, directed them first to advertise for the period of thirty days for bids or proposals to fill up, grade, pave and curb, in part or in whole, the said sidewalks. This was a preliminary condition to be performed. A plea, therefore, denying that any such advertisement was made, would be a good plea: *Kneeland v. Milwaukee*, 18 Wis., 431; *Wells v. Burnham*, 20 Wis., 119. Such a plea is contained in the amended answer, filed February 20th, 1875.

But the plea is a special one, denying, it is true, that any such advertisement for bids or proposals was made as required by the ordinance; but setting forth and showing what advertisement was made, and how it was published. It gave notice that proposals would be received at the mayor's office until a certain day named, to fill up to the grade and pave the sidewalks specified in the ordinance; describing the work to be done as prescribed in the ordinance; and stating that it would be paid for in bonds of the city, as also specified in the

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ordinance for that purpose; and that specifications of the work would be prepared by the city engineer, and could be seen by calling at the mayor's office. It closed with these words: "Any other information desired will be furnished. The city reserves the right to reject any and all bids." It was signed by the mayor, in his official capacity; was dated the 14th of January, 1874, and was published in the *Galveston Daily News* from the 15th of January to the 16th of February inclusive, in every issue of the paper.

It seems to me that this was a substantial compliance with the terms of the ordinance. It is objected that it was signed by the mayor alone, and not by the chairman of the street committee. I do not think that this was a fatal defect. It performed the office designed for it in the ordinance. It was a mere notice to the public that bids or proposals could be made at the mayor's office, and the mayor's official signature, as one of the committee, was sufficient to authenticate it. And I am unable to see that it was defective in any substantial respect. The defendant's counsel has criticised its terms as being too vague and general, and as including the whole work in one lump. This is not its necessary construction, and *bona fide* contractors ought not to be prejudiced by too nice and critical a construction of such an advertisement. If there was collusion between the plaintiff and the city officials, in making it vague and general, that is another matter which comes under the head of fraud.

I think the advertisement shown by the plea was a sufficient compliance with the ordinance, and the demurrer to this part of the plea must be sustained.

Secondly. I have more difficulty with regard to the alleged want of specifications, which are referred to in the advertisement and in the contract itself. The advertisement states that specifications of the work for which proposals are invited will be prepared by the city engineer, and can be seen by calling at this (the mayor's) office. The contract declares that "all the above work is to be done and executed in accordance with the specifications of the city engineer, now on file in the mayor's office." The plea alleges that no

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such specifications were prepared at all, at any time before the contract was made, nor during the publication of the advertisement, and none such were ever on file, or to be found in the mayor's office.

I do not think that the fact, that there were no such specifications, affected the authority of the mayor and chairman of the street committee to make the contract they did: *Omaha v. Hammond*, 94 U. S., 98. Parties desiring to bid may have been sufficiently informed on calling at the office what the nature and requirements of the work would be. And it would be hard to visit upon the contractors the neglect of the city engineer to have the specifications completed.

The greater difficulty arises from the provision contained in the contract itself, requiring the work to be done according to the specifications declared to be then in the mayor's office. Their actual presence in the office at the time of executing the contract was not a material circumstance, if they had been prepared and were then in existence. The identity of the specifications referred to would be ascertained by extrinsic evidence. But if they were not in existence, the question arises whether the contract must not fail for want of certainty. It is true, they must be regarded as referred to for the benefit of the city, and the city declared them to be prepared and in the mayor's office. Is not the city estopped to deny their existence? If not forthcoming when applied for by the contractors, might the latter not proceed and do the work in the usual way in which such work is accustomed to be done? The contract itself specified of what materials the paving was to be made, as soon as the choice of the property-holders was determined. As to the other work of filling up, grading, etc., the mode of doing it, beyond what the contract itself prescribed, is a common and well-known process. I am inclined to think that it was optional with the contractors either to refuse to do the work for want of the stipulated specifications, and to seek damages for non-fulfillment of the contract in that regard on the part of the city, or to go on and do the work in the ordinary and accustomed mode. Had the contract been to do the work according to specifications

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to be prepared by the engineer, a failure to prepare them, on the demand of the contractors, would have given them this option. There are cases, undoubtedly, where specifications referred to in a contract are absolutely essential to its due certainty, and to a possible performance of it—as where a builder contracts to build a house according to certain specifications to be furnished by the owner, or alleged to be already prepared by him. But I am inclined to think that the contract in this case was capable of substantial performance without the specifications. Under this view, I shall hold the plea to be bad.

Thirdly. The fact that no grade had been established when the contract was made does not, in my judgment, vitiate it. There is nothing in the contract that ties it to a grade then established; nothing repugnant to, or that would prevent, the grade being fixed from time to time as the work progressed. I do not think that the want of such grade can be pleaded to the validity of the contract. (See Parsons on Contracts, vol. 2, p. 563 and note.)

Fourthly. The plea that no notice was given to the property-holders to do the work, as required by the third section of ordinance 21, as amended by ordinance 26, has given me much perplexity. The terms of the proviso on that subject are as follows:

“*Provided*, That it is herein made the duty of the street superintendent to serve written notice on all the property-owners, or their authorized agents, whose sidewalks may not be of proper material and in conformity with grade, to construct the same within a period of sixty days after notice, in the manner and with one or the other of the materials named in the first section of this amendment; and any fault or failure to comply with the requirements of such notice, shall then authorize the mayor and chairman of the committee on streets and alleys to proceed to have constructed the sidewalks in front of the property of any defaulting property-owner or owners, as provided in the ordinance to which this is an amendment.” Here the authority of the mayor and chairman “to proceed” is limited upon the failure of the property

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owners to comply with a certain notice to be served upon them. If no such notice was given, and no such failure occurred, it is difficult to see how the mayor and chairman derived from the ordinance the authority "to proceed" to have the sidewalks constructed by contract.

By the ordinary rules of pleading (supposing this to have been a necessary condition to be performed before the making of a contract), the plaintiffs were not required to allege its performance in their petition. It would be for the defendants to plead its non-performance. They have done so. They allege that no such notice was given. It may be urged against the validity of the plea, that the contractors were not bound to know whether this condition had been performed or not. But certainly they were bound to know whether the officers with whom they dealt had authority to act for the city, and what was the extent of that authority. This is a matter that affects the authority of the mayor and chairman of the street committee. The matter was one of importance. It seriously affected every property holder. As at present advised, I must decide that the plea is a good one, and that the demurrer to it must be overruled.

Fifthly. It is pleaded that the contract contains provisions on their face repugnant to the ordinances, and does not pursue the terms thereof. I do not use the words of the plea. This is its substance. One point made is, that the proviso requiring the consent of the property holders to the kind of pavement to be laid, is different in its terms and scope from the provisions of the ordinance in that respect. This and other discrepancies are also set up in the amended answer filed May 29th, 1878.

Without going into particulars on this point, it is sufficient to say, that having carefully examined the ordinances, I do not see that the contract can be said to be outside of or beyond them in any such sense as to make it void. The contract must necessarily descend to particulars which the ordinances could not be expected to state; but I do not perceive that it contains anything repugnant thereto, or that might not fairly be embraced therein. The severance of the con-

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tract for paving from that of grading and filling was considered by the Supreme Court and sustained, as was also the application of the proviso for the consent of the property owners to one part, and not to the other. This proviso, it is true, requires the consent of the property owners generally, whilst the ordinance only speaks of a majority. The want of correspondence in this respect only imposes a more rigid condition on the contractor, and if he consented to it, no one else can object.

But, as remarked, without attempting a minute criticism of the two documents, it seems to me that the contract, as written, was fairly within the power of the committee to make. The demurrer to this plea is sustained.

Sixthly. The objection made in the same connection that the contract did not conform to the advertisement for proposals, I do not think is tenable. The officers, in making a contract, were not bound to follow the advertisement, provided they kept within the scope of the ordinances. Besides, the advertisement could only indicate general outlines, and could not be expected to contain all the minutiae of a contract. The demurrer to this plea is also sustained.

The disposal of these general subjects goes far to dispose of the whole demurrer. There are, however, some other matters contained in the amended answer filed May 29, 1878, which are demurred to, and which it is necessary to notice.

Some difficulty is experienced in separating this answer into distinct parts, or pleas, and in distinguishing the latter from mere argument and statements of law. As well as I can, I will consider its different parts so far as not already disposed of.

The first two pages (I shall have to refer to it in this way) consist of further demurrers to the petition, which have been disposed of by a previous order made at this term.

The third page commences with a detailed statement of certain proceedings which are alleged to have taken place in the common council in October, 1873, being a report of proceedings by the mayor and chairman of the street committee, the adoption of the amended ordinance of October 21st,

Hayden v. The Cochrane.

GALVESTON, MAY TERM, 1879.

JOHN H. HAYDEN ET AL. V. THE BARK C. W. COCHRANE
AND CARGO.

1. Where a bark laden with cotton, and anchored outside the bar, took fire, and as the only means of saving ship and cargo she was towed by salvors into shallow water and filled and sunk, and her hull and cargo were afterwards sold in that condition: *Held*, that the sum which they brought at the sale was the measure of the salvaged property, and that salvage should be allowed on that basis.
2. The amount allowed in the case to the salvors stated.

ADMIRALTY APPEAL.

On January 9, 1879, the bark C. W. Cochrane was lying off the bar at Galveston, in about six fathoms and a half of water, engaged in taking in a cargo of cotton from lighters. The bark was worth \$70,000, and had taken aboard 2,600 bales of cotton, worth \$104,000.

About one o'clock, p. m., of the day just mentioned, the cotton stowed in the lower forward hold was discovered to be on fire, in a part of the ship which was inaccessible.

The master was absent, but the first officer who was in charge of the vessel, closed all vents so as to keep down the fire, and set signals of distress. When the fire was first discovered, the first officer had with him six men of the crew and five stevedores who had been engaged in stowing the cargo. Several steam tugs and lighters answered the signal, came to the assistance of the bark. These were the steam-tugs Buckthorn, Joy, and the steam-lighter Ella Knight. They all tried to subdue the fire by pumping water into the hold of the bark.

About 10 p. m., the master of the bark arrived. On consultation, the master decided that the only way to save the bark and cargo from total loss was to tow her into 20-feet water and fill her. This was done. The lighter Ella Knight and the tug Joy towed the bark shorewards to a place where there was about 20 feet water and a mud bottom, where she

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contemplated improvements. They reported, however, that after an interview with the plaintiff Hitchcock, they had arranged with him to make such changes in the contract as would obviate and remove all objections to it. These were, to reduce the price for curbing from 45 to 30 cents; for edging from 9 to 6 cents, paying in bonds as originally contracted for; and, thirdly, to apportion the cost of filling equitably against the respective pieces of property to be improved; fourthly, to give the property owners thirty days to comply with the ordinance directing the improvements to be made. They also recommended an ordinance amendatory of that of February 3d, 1874 (No. 37). These amendments were intended to secure the due construction of the sidewalks by those property owners who should elect to construct the same. These recommendations of the majority of the committee were adopted by the council. The answer further alleges that the plaintiffs, in violation of the agreement so made with the committee, as reported by them, refused to carry out the same, and published a notice on the 7th of April claiming a right under the original contract, to do the whole work.

This plea, in effect, denies that the contract originally entered into was ratified by the common council, but sets up that, by way of compromise, a new contract was entered into, which both parties acceded to, and that the plaintiffs afterwards refused to carry it out. Now, if all the facts can be proved which are set out in the report of the committee, and rehearsed in the plea, to wit, that the plaintiffs did make a new contract as stated, it seems to me, as stated in the former opinion, that it makes a valid defense to this action. The plea is, therefore, in my opinion, a good plea, and the demurrer to it must be overruled.

The same plea, in effect, but stated with more categorical precision, is made at the conclusion of the answer, on the 12th and 13th pages thereof, and the demurrer thereto must, in like manner, be overruled.

I have revised a form of judgment prepared by the plaintiffs' counsel, which correctly expresses the conclusions to which I have come.

Hayden v. The Cochrane.

crew and the stevedores worked on board the bark, stripping her of her rigging and other property and passing them on board the Ella Knight. Fifteen bales of cotton were transferred in this manner.

On January 12, the steamer Star went to the wreck, which was still burning, and put out the fire which was confined to the hull above the water line. The bark had filled with water.

The services rendered the bark resulted in placing her where she could be wrecked and her cargo taken out, and this was all that it was possible to accomplish. If she had burned and sunk where she took fire, she would have been a total loss.

The Ella Knight, in performing the service stated, had one of her guards split, to repair which would cost from \$100 to \$200. The value of the Ella Knight's service in her ordinary business at that time was \$350 per day.

A number of stevedores, who had been engaged in stowing the cargo of the bark, assisted in getting out about sixty bales of cotton and in stripping the bark of her rigging and passing the cotton and rigging over to the Ella Knight, whereby they were saved.

The hull of the bark as she lay submerged, and the cotton in her hold, and the tackle, rigging, boats and cotton saved from the bark were all sold by order of the district court.

After paying costs, there was paid of the proceeds of these sales, into the registry of the court, the sum of \$15,596.08.

The claims of all salvors have been adjusted, except the demand of the Ella Knight, the pilot, Captain Guthrie and the stevedores above mentioned.

Messrs. Robert G. Street, George Flourney and J. Z. H. Scott, for the several libelants and intervenors.

Messrs. T. N. Waul and H. C. Pratt, for the claimants.

Woods, Circuit Judge. I think it is clear that the service rendered by the Knight, by Guthrie and by the stevedores above mentioned, was a salvage service. When a ship or its lading is saved from an impending peril by the service of

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any person who is under no obligation to render the service, it is a salvage service.

The peril of the property saved, the hazardous nature of the service, are considerations which go to the amount of the salvage.

In this case, the value of the property salvaged is measured by the amount paid into the registry of the court, the proceeds of its sale.

The cotton and the tackle, boats, etc., taken from the bark and brought into the city are, of course, salvaged property. According to the agreed facts, had it not been for the services of the libelants and others, the bark and her entire cargo would have proved a total loss.

Through the exertions of the salvors the bark and her cargo remaining on board, was placed in such a position that it brought at public sale \$14,275. The fact that it was submerged does not make it any the less a fact that it was saved. By the efforts of the salvors it was rescued from the peril which threatened it, and brought to a position of safety. The proceeds of its sale show what was saved, and upon that amount the salvage should be allowed.

The salvage service was faithfully rendered, and was attended with some, though not a high degree of danger.

After some consideration, I think that the following allowance of salvage should be made :

To the Ella Knight and crew	\$1,500
To Captain Guthrie	100
To each of the stevedores mentioned in the agreed facts,	20

And it is decreed accordingly.

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TYLER, JUNE TERM, 1879.

THE STATE OF TEXAS v. THE TEXAS & PACIFIC RAILROAD
COMPANY.

1. Under section 640, Revised Statutes, the right of one of the class of corporations therein mentioned, when sued in a state court, to remove the cause to the federal court does not depend on the citizenship of the parties.
2. The truth of averments made by such defendant corporation in its petition for removal, to the effect that it has a defense arising under or by virtue of the constitution or laws of the United States, cannot be inquired into or controverted on a motion to remand the cause to the state court.
3. Under said section the defendant corporation may remove a cause otherwise proper to be removed, from the state to the federal court notwithstanding the fact that a state is plaintiff in the action.

Heard upon motion to remand to the state court.

This case was removed from the district court of Harrison county, Texas, to the United States circuit court at Tyler, then in the Western District of Texas.

A motion to remand the cause was argued at the November term, 1878, before Judge T. H. Duval, district judge of the western district, and he held the matter under advisement.

In the meanwhile (before Judge Duval had decided the motion), by act of congress, the court at Tyler was placed in the Eastern District, and the Hon. Amos Morrill, the district judge of the Eastern District, became its presiding officer.

At the May term, 1879, Judge Morrill disposed of the pending motion to remand, and in doing so read the following opinion, which had been previously prepared by Judge Duval, as expressing also his views of the law.

Messrs. H. H. Boone, attorney-general, and Geo. McCormick, assistant attorney-general of Texas, for the state.

Messrs. F. B. Sexton and W. Stedman, for the defendant.

DUVAL, District Judge. This is a suit brought in the dis-

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strict court of Harrison county, state of Texas, on the 26th day of September, 1877.

Its object is to recover of the defendant as forfeited certain land grants and reservations made and granted to it by the state of Texas, etc.

On the 5th of November, 1877, the defendant filed in said court its petition, verified by oath, alleging that it was a corporation, other than a banking corporation, created, existing, and organized under and by virtue of certain acts of the congress of the United States, and that it had a defense to the said action arising under and by virtue of a law of the United States, to wit, its acts of incorporation and the constitution of the United States, and that the matter in dispute, exclusive of costs, exceeded five hundred dollars.

It further offered a bond with good and sufficient security, conditioned according to law, and prayed that the cause might be removed for trial to the circuit court of the United States for the Western District of Texas, at Tyler.

To this petition the plaintiff at once filed a general demurrer, and certain special exceptions.

On the 12th of November the cause was continued by consent, without prejudice to the motion to remove, and on the 1st of June, 1878, the court rendered judgment, overruling the motion for removal.

The defendant thereupon obtained a transcript of the proceedings and filed the same in this court, on the 7th day of October, 1878.

The right of removal in this case is based upon the act of congress of 29th of July, 1868, section 640 of the Revised Statutes of the United States.

It provides as follows: "Any suit commenced in any court other than a circuit or district court of the United States, against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof, as such member, for any alleged liability of such corporation or of such member as a member thereof, may be removed for trial in the circuit court for the district where such suit is pending, upon the petition of such defend-

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ant, verified by oath, stating that such defendant has a defense arising under or by virtue of the constitution, or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section."

The different statutes in regard to the removal of causes from a state to a circuit court of the United States, commencing with the judiciary act of 1789 and coming down to and including the act of March 3d, 1875, make the right of removal dependent either upon the subject matter involved, or the citizenship of the parties.

In my opinion, the right of removal, under section 640 of the Revised Statutes, is not affected at all by the citizenship of the parties, but depends wholly on the subject matter of the controversy, and the character of the defendant.

In other words, if the defendant is a corporation, other than a banking corporation, organized under a law of the United States, it has the right, under section 640, to remove a suit brought against it in a state court to the circuit court of the United States, upon its petition, verified by oath, stating that it has a defense arising under and by virtue of the constitution, or of any treaty or law of the United States, and in such case this right exists independent of the citizenship of the parties, plaintiff or defendant.

The defendant herein avers that he has a defense against the action by virtue of a right arising under the laws of congress incorporating it, and the constitution of the United States.

The truth of this averment cannot be controverted or inquired into upon a motion to remand.

It is a matter for determination on the pleadings and proof at the trial: *The Mayor v. Cooper*, 6 Wall., 247. There can be no doubt that congress in giving a corporation other than a banking one, setting up a right or defense under the constitution, or a law of the United States, the right to remove the same from a state court to a United States circuit court, intended to secure the interpretation of such constitution and laws, at the original hearing to its own judiciary,

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and this, it seems to me, is but just and reasonable, and can work no injury to the plaintiff.

In this case, the defendant has, in my opinion, complied with all the requirements of the different removal acts of congress applicable to his case, entitling him to its removal here.

Upon one point alone, arising upon the exceptions of the plaintiff, have I found any difficulty. This is, that the suit being one instituted by the state of Texas, in one of her own courts, and the state, as such, being sovereign and incapable of being sued, is not embraced within the meaning of section 640, allowing the removal of causes by a corporation from the state courts.

I am aware that, by the 11th amendment to the constitution of the United States, no suit can be brought against a state of the Union.

But in this case it is the state which brings a suit against a corporation, created by the United States. If the former cannot be sued, it does not follow that, if she brings a suit in a court of her own creation against the latter, congress may not authorize a removal of it to a court of the United States.

The United States cannot be sued, and yet under the act of March 3d, 1875, it is provided that, in a case wherein the United States is plaintiff in any state court, either party may remove the same into a circuit court.

It would seem strange indeed that in cases where the United States was plaintiff in a state court, and the defendant could remove them into a circuit court of the United States, that the same right should not exist where a state was plaintiff in its own court, especially when the construction and interpretation of the constitution or an act of congress was concerned.

The language of section 640 is very broad. It provides for the removal of "any suit" falling within its provisions to the United States circuit court, and I believe it is comprehensive enough to embrace suits brought by a sovereign state as well as by one of its citizens.

From the most careful study and reference to authorities

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as bearing on this question, I am of the opinion that the motion to remand should be refused, and it is so ordered.

If this cause was improperly removed into this court, or if jurisdiction is here entertained of it in which, by law, it can have none, I am glad that it will furnish a ground of appeal to the Supreme Court of the United States.

This, I believe, has been determined in the case of *Knapp v. Railroad Co.*, 20 Wallace, 117.

Motion refused.

WESTERN DISTRICT OF TEXAS.

TYLER, APRIL TERM, 1877.

WILLIAM A. KIDWELL v. THE HOUSTON & GREAT NORTHERN
RAILWAY COMPANY.

1. Where the servant of a railroad company sues for an injury caused by a defective car, there must be an averment that the car was defective when placed upon the road, or if it subsequently became defective, that notice of the defect was brought home to the company.
2. A notice of the defect to the car-inspector and master mechanic would only tend to show negligence of duty on their part, and they being fellow-servants of the plaintiff, no cause of action could be based on such negligence.
3. Notice of the habitual negligence and general bad habits of a car inspector, brought home to the master mechanic of a railroad company, will not make the company liable for an injury to another servant of the company, resulting from the negligence of the car inspector, unless it is shown that power was conferred by the company upon the master mechanic to employ and discharge the car inspector.

Heard upon demurrer to the declaration.

The plaintiff being a servant of defendant, as an assistant yard master, sued for injuries alleged to have been received by him by reason of the neglect of the defendant in keeping in use and running a certain defective car, which he attended to, etc. He admitted that he knew of the defect alleged to exist therein, but averred that before the accident happened the car inspector, whose business it was to report the defect to the master mechanic, was duly notified of the same, as was also the master mechanic, but they both failed and neglected to have said defective car retired or repaired; and, further, that said master mechanic was advised of the habitual negligence and general bad habits of the car inspector, and failed

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to discharge him, etc., and that thereby the defendant became responsible to plaintiff.

The defendant demurred to the declaration in which the foregoing facts were set forth as a cause of action.

Messrs. John C. Robertson and W. S. Herndon, for plaintiff.

Messrs. Tignal W. Jones and John L. Henry, for defendant.

DUVAL, District Judge. The defendant demurs generally to the petition. This raises the question whether, admitting the truth of its averments, the defendant is, in law, liable.

The great weight of authority, both in this country and in England, seems to have established the general rule that a railroad company is not liable to one of its employes or servants for an injury occasioned by the neglect of any of his co-servants employed in the same general business of operating the road, even though the negligent servant may have been superior to the one injured in his grade of employment, provided the company has, in the first instance, procured good and sound machinery, and provided skillful and competent employes to work it.

In the case at bar, there is no averment that the car in question was defective when furnished by the company, nor is there any averment that its subsequent defect was made known to the company, unless a notice thereof to the car inspector and master mechanic can be considered as such. But in the absence of any averment that they, or either of them, ever reported such defect to the company or its superintendent, the company cannot be held liable on this ground.

It is contended by plaintiff's counsel that the averment in the petition, charging that the "master mechanic was advised of the habitual negligence and general bad habits of said car inspector, and that he failed and refused to discharge him," takes this case out of the general rule, as being equivalent to a charge that the company had employed an unskillful or incompetent car inspector.

If the petition had averred directly and affirmatively that

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the car inspector employed by the company was not a man of competent skill and prudence, and was carelessly and negligently employed by the company, I think this would have been sufficient on demurrer, because the defendant was bound to use reasonable diligence in the employment of skillful and prudent servants. But the averment is not that he was "incompetent," but that the master mechanic was advised that he was habitually negligent and of general bad habits. This may be admitted, and still he may have been very skillful and competent for his business. The charge, thus vaguely made seems to me only to amount to a charge of negligence on the part of the master mechanic in not reporting the character of the car inspector to the officers of the company, and does not, therefore, constitute an exception to the general rule that a railroad company is not liable to one of its employes for the mere negligence of another employe.

It does not appear that the master machinist was anything more than a fellow-servant of the car inspector and the plaintiff, without the power of appointment or removal. Under these circumstances the defendant company could not be made liable: *Hard, admr., v. Vermont & Canada R. R. Co.*, 32 Ver., 473; *Wonder v. Balt. & Ohio R. R. Co.*, 32 Md., 411, *Robinson v. Houston & Texas Cent. R. W. Co.*, 46 Tex., 540.

The demurrer must be sustained.

Allen v. The Dallas & Wichita Railroad Co.

TYLER, AT CHAMBERS, AUGUST, 1878.

THOMAS ALLEN ET AL. V. THE DALLAS & WICHITA RAIL-
ROAD COMPANY ET AL.

1. Service of notice or process upon the officer of a railroad company, authorized by its charter or the law to receive service, is good, although such officer may fraudulently conceal the fact of such service from other officers of the company.
2. But where such officer fraudulently conceals the service upon him of a motion for the appointment of a receiver of the property and effects of the railroad company, and by means of such concealment the company fails to resist such appointment, and claims that the same is an invasion of its rights, and ought not to have been made, the court will re-open the case and allow the company to move to vacate the appointment.
3. An unreasonable delay in making the motion to vacate the appointment of the receiver will be regarded as an acquiescence in such appointment.
4. Persons who hold negotiable railroad bonds as collateral security for the payment of debts due them by the railroad company, are *bona fide* holders for value, and are entitled to enforce the payment of the bonds as long as the debts for which they were hypothecated remain unpaid.
5. Where a deed of trust executed by a railroad company mortgaged its income and profits, as well as its railroad and other property, to secure the payment of the principal and interest of its bonds, and authorized the trustees, in default of the payment of the interest, to take possession of the mortgaged property, and apply the income to the payment of the interest: *Held*, upon the application of the trustees, that such default was a sufficient ground for the appointment of a receiver.
6. In such a case, the appointment of a receiver should not be denied because it is not shown that the property mortgaged is insufficient to pay the mortgage debt, or that it is in jeopardy, or that the company is insolvent, or because the amount due on some of the bonds is in dispute.
7. The charter of a railroad company conferred on it a large grant of land, but provided that unless twenty miles of its road were completed and in order for use before a date named, both the charter and the land grant should become forfeited. The company had issued and sold 250 bonds of \$1,000 each, which were secured by a deed of trust on its road and other property. The company was insolvent.

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About two miles of the twenty miles of its track remained to be built, and little over one month of the time limited for the completion of the twenty miles remained. The company was unable to procure the means to build the remaining two miles, the contractor for building the road had failed and had abandoned his contract, and there was imminent danger of the forfeiture of the charter of the company and of its grant of lands. *Held*, that under these circumstances, it was the duty of the court, upon the application of trustees of the bondholders, to appoint a receiver, with authority and orders to complete the twenty miles of road within the time limited by the charter.

8. Where a contractor for constructing a railroad was entitled, under his contract, to the possession of the road until his contract was completed, and he received from the railroad company a large number of bonds which were secured by a trust deed on the road, which authorized the trustees to take possession of the road upon default in the payment of the interest on the bonds, and the contractor transferred the bonds for value: *Held*, that his right to the possession of the road, under his contract with the company, was subordinate to the right of the trustees to the possession upon default in the payment of interest on the bonds.

IN EQUITY. Heard at chambers, on motion of defendants to vacate order for appointment of receiver.

On May 24, 1878, the complainants filed their bill, and moved at chambers, before the circuit judge, for the appointment of a receiver of the property and effects of the defendant railroad company. Counsel appeared for the railroad company and the defendant Malcolm Henderson, who was a contractor for the construction of the railroad, and was alleged to be in possession of its track and other property, and, upon the showing made by the bill and the testimony submitted, the court appointed a receiver, the defendants' counsel making no opposition.

The receiver took possession of the property of the defendant railroad company on May 27, and proceeded, under the authority of the orders of the court, to expend about \$5,000 dollars thereon. Afterwards, on June 26, a notice was served on complainants that, on July 8, the defendant railroad company and Silas Reed, also a defendant, would move the court to vacate the order for the appointment of a receiver upon the answers and affidavits on file.

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Complainants and defendants being both represented by counsel, the motion of the defendants was heard upon July 8, the day named in the notice.

The bill was filed by Thomas Allen and George H. Nettleton, citizens of Missouri, as trustees named in a deed of trust executed by the defendant railroad company to secure its first mortgage bonds.

The bill averred, in substance, that the Dallas & Wichita railroad company was duly incorporated by the state of Texas to construct and use a railroad from Dallas, in said state, northwestwardly through the town of Denton to any point on the waters of the Red or Canadian rivers, within the territory of Texas.

That the company had constructed a railroad from Dallas to an unnamed point about 18 miles distant, in a northwestwardly direction, and was maintaining and using the same.

That the legislature had granted to the railroad company sixteen sections of land, of 640 acres each, for every mile of railroad constructed by it, in accordance with the provisions of the act making the grant, and that the company had received a portion of said lands.

On June 5, 1877, as the bill alleged, the railroad company had constructed ten miles of its road, and for the purpose of securing 1,250 bonds, of \$1,000, each, to be issued by it, in order to raise money thereon to complete its line of road, did, being duly authorized so to do, execute and deliver to complainants, as trustees, a deed of trust upon all the right and title which the company had or might thereafter acquire in lands granted to it by the state of Texas by act approved May 24, 1873, and also upon the railroad of said company then or thereafter to be constructed from the city of Dallas, for the distance of one hundred miles in a northwestwardly direction, and all its equipments then owned or to be thereafter purchased, and "all the income, revenue and tolls of said railroad and property, and all the franchises and rights" of said company, and all property of any description acquired and to be thereafter acquired by it.

The bonds were made payable to complainants as trustees,

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or bearer, on July 1, 1897, at the office of the Union Insurance Company in New York, with interest at the rate of seven per cent per annum, payable semi-annually at the place aforesaid, on the first days of January and July of each year, and as the bonds declared, "on the presentation and surrender of the annexed coupons as they severally fall due;" and in case of default in the payment of any semi-annual installments of interest which had become due and had been demanded, and in case such interest should remain unpaid for three months after such default and demand, then the principal of the bonds might be declared and made due in the manner provided in the deed of trust.

The deed of trust also provided that upon default in the payment of the principal or interest, and a continuance of such default for the period of three months, then all of said bonds should immediately become due, and it should be competent and lawful for said trustees to enter upon and take possession of the premises and property conveyed by the trust deed, and upon the written request of the holders of one-tenth of said bonds, at any time outstanding and unpaid, it was made the duty of said trustees to enter upon and take possession of all the trust property, and to have, use and employ the railroad and all its appurtenances and property thereto belonging and proper for its use, and to manage and operate the same, and to apply the proceeds thereof *pro rata* to the payment of the principal and interest of the bonds outstanding and unpaid, for all which they were to receive a reasonable compensation. Or they might cause the trust property, or so much as might be necessary to pay the amount due and unpaid on said bonds, to be sold after ninety days' notice, and upon such sale to make and deliver to the purchaser a deed in fee simple for the same, and to apply the proceeds of such sale, after paying the costs and expenses of the sale, to the payment of the principal and interest of said bonds.

The deed of trust further provided that it should be lawful for the railroad company to manage and use said railroad and property, and to receive and dispose of the current re-

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venues thereof until default in the payment of the principal or interest of said bonds, or some of them.

After the said deed of trust had been duly executed and recorded, the railroad company, according to the averments of the bill, executed and sold in the market, for a valuable consideration, its two hundred and fifty bonds of one thousand dollars each, all dated July 5, 1877, payable, both principal and interest, as above stated, and the bonds are all outstanding, and are now owned by *bona fide* purchasers for value.

The railroad company made default in the payment of the interest due on said bonds on January 1, 1878, and payment thereof was demanded, and such default continued more than three months after such demand, and it was therefore claimed and averred that all said bonds, both principal and interest, had become due, and it was averred that all the holders of the bonds had united in a request to the complainants, as trustees, to enforce the said deed of trust and the trust thereby created.

The bill further alleged that the defendant Malcolm Henderson was and had been in possession of the company's railroad, receiving the tolls and profits thereof ever since the execution of said mortgage, under a contract whereby he was to construct said railroad for a certain consideration, and in the mean time, and while such construction was going on, to possess and use the same, and said Henderson had not only failed to provide for and pay the interest on the bonds issued by the company, but had stopped the further construction of the railroad.

The charter of the railroad company, and the acts of the legislature amendatory thereof, declared that unless twenty miles of its railroad should be fully completed and in operation by the first day of July, 1878, the charter, with the land grant thereto attached, should become forfeited, whereby the security of the bond-holders would be wholly lost.

Henderson, in the construction of the eighteen miles of said railroad, had contracted many debts for labor and materials; suit had been brought on the same against the railroad

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company, and judgment obtained thereon against the company, although said debts were the debts of Henderson, and executions had issued on the judgments, and the railroad had been levied on and advertised for sale.

The complainants further alleged that they were apprehensive, not only that the charter of said railroad company would become forfeited, but that the income and tolls of said railroad would be wholly diverted from the payment of the interest on the bonds, and applied to the payment of said judgments and other unsecured claims against said Henderson and the railroad company.

Henderson, Silas Reed and other persons, who, it was alleged, had, or claimed, some interest or lien upon the railroad, were made defendants to the bill, and the bill prayed for the appointment of a receiver to take possession of the railroad and other property of the railroad company, and to manage and use the same, and for a foreclosure and sale of the property covered by the deed of trust.

This bill was verified by the oath of Geo. H. Nettleton, one of the complainants, who swore that he had read and knew the contents thereof, and that he believed the same to be true.

Upon the statements of the bill, and the production of the coupons due January 1, 1878, with the protest of the notary showing demand of payment on that day and non-payment, and proof that the holders of all the bonds had united in a request to the trustees, complainants, that they should enforce said deed of trust and the trusts thereby created, and no objection being made by either the railroad company or the defendant Henderson, the court appointed Ira Harris, the secretary of the Kansas City Rolling Mill, receiver of the said trust property.

The grounds of the motion to discharge the receiver were:

1. That the railroad company was not served with notice of the motion to appoint a receiver, and the appointment, so far as it was concerned, was *ex parte*.

2. That the railroad company had never negotiated any of its bonds, and that there had been no default on its part.

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3. That there was, in fact, no necessity for the appointment of a receiver, and upon all the facts of the case none should not have been appointed.

Mr. Alexander White, for the motion.

Messrs. J. Brumback and C. W. Blair, contra.

WOODS, Circuit Judge. 1. The facts concerning notice to this company, of the motion for the appointment of a receiver, were these:

A notice was served on J. W. Calder, the vice-president of the company, on May 18, 1878, in the city of Dallas, Texas, where the principal office of the defendant railroad company was, during the absence from the city of W. H. Gaston, the president, and Calder authorized counsel to appear for the railroad company. The service of a notice upon the vice-president of the company, under these circumstances, was a good service upon the company, according to the statutes of Texas and the by-laws of the company. No objection was made by Calder to the form of the notice or the manner in which it was served on him. Neither the complainants nor their counsel were responsible for what Calder did after this notice was served on him. He was the representative of the company, appointed by it, and if he was an unfaithful agent, the principal of the agent, according to the general law, and not other parties, must suffer by his neglect or misconduct. There is no proof and no claim that either the complainants or their counsel were in any complicity with Calder to prevent notice of the motion for a receiver from coming to the knowledge of other officers of the company.

The proof shows that Calder was acting as agent for one of the bondholders, and that he did not communicate the fact that a motion was to be made for a receiver to any other officer of the company. There is no doubt, also, that if the president and other agents of the company had received notice of the motion, the company would have resisted it, and there is little doubt that Calder purposely kept them in ignorance of the fact that the motion was to be made. This is the conviction left on my mind by all the evidence.

Waiving for the present any consideration of the delay of the defendants in giving notice of their purpose to make the present motion, under the circumstances of the case, if now, any of the defendants in interest can make it appear that the appointment of a receiver by the court was an invasion of their rights, that the facts did not justify such an appointment, and that the same was unadvisedly and improvidently made, I think they ought to be heard and the appointment revoked, and the condition of things before the appointment, as far as possible, restored.

The question, therefore, is presented whether, in view of all the facts now made to appear, the court should in the first instance have appointed a receiver.

To sustain its side of this issue, the railroad company has filed its own answer, sworn to by W. H. Gaston, its president, the answers of Silas Reed, A. T. Obenhain and Jules Schneider, and the affidavits of W. H. Gaston, president, and Geo. Shields, secretary of the railroad company, and W. M. Johnson, engineer.

The complainants, to sustain the appointment of the receiver, offer the bill verified, as before stated, by one of the complainants, and the affidavits of Wallace Pratt, C. W. Blair, J. W. Calder, Ira Harris, W. L. Doane, J. Brumbach, J. B. J. Fenton and C. F. Stevens. They also again produce 250 coupons due January 1, 1878, cut from the first mortgage bonds of the railroad company, with evidence of their presentation for payment and of their non-payment.

2. The claim that the railroad company has never issued its bonds and that no default has been made in the payment of the coupons is entirely unsustained. On the contrary, the proof is conclusive not only that the bonds were issued by the company, but that it received full value for every bond issued.

The facts, as shown by the testimony, are as follows: One Alexander Calder was a creditor of the railroad company to the amount of twenty thousand dollars, for which he held the obligation of the company, secured by a mortgage duly recorded on February 12, 1876, on the company's road and

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property; and that, to secure a release and cancellation of this mortgage, the railroad company caused to be transferred to him sixty of the first mortgage bonds in suit, to be held by him as collateral security for the payment of his claim. This stipulation was carried into effect. The sixty bonds were delivered to W. E. Hughes, as trustee for Alexander Calder, who thereupon dismissed a suit which he (Calder) had commenced in this court to foreclose his mortgage, and entered a release of the mortgage on record. Afterwards, about April 1, 1878, the railroad company having failed to comply with the stipulations which said bonds were pledged to secure, the same were, in strict conformity with the terms of the contract of pledge, sold in New York city after due notice by an auctioneer, and bought in by said Alexander Calder, who thereupon became their absolute owner.

As to the remaining one hundred and ninety bonds, the proof shows that they were delivered by the railroad company to Malcolm Henderson, the contractor for the construction of the railroad, in payment of the work done and to be done by him, and to enable him to procure materials to carry on and complete his contract for the construction of the railroad, and that by the assent of Henderson and of the railroad company, the one hundred and ninety bonds were transferred to Ira Harris, the agent of the Kansas Rolling Mill, as trustee, to hold as collateral security for the payment of certain notes given by Henderson to the Kansas Rolling Mill Company, for iron furnished for the railroad, and which had been laid down in the track, and with power to sell said bonds at public or private sale in the event the said notes of Henderson were not paid at maturity, the proceeds of the sale to be applied to the payment of Henderson's notes. In fact, all the iron used in laying the track of the railroad was furnished by the Kansas Rolling Mill Company, and it has received nothing therefor except the notes of Henderson, secured by the transfer of the said one hundred and ninety bonds. Henderson paid nothing on his notes to the Kansas Rolling Mill Company, and on May 3, 1878, the one hundred and ninety bonds

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were sold to one W. L. Doane, who claimed to be the holder and in possession of the same.

There is nothing in the record to show that, while Alexander Calder and the Kansas Rolling Mill Company held these bonds, they were not holders for value without notice, nor is there anything in the record tending to show that there are any defenses whatever which the railroad company could set up, even as against Henderson, the first transferee of the bonds.

On this state of facts, which is clearly shown by the proof, and which there is no satisfactory evidence to contradict, it is hard to conceive on what grounds the railroad company can claim that it never issued or negotiated its bonds. Even if the bonds were still held by Alexander Calder and the Kansas Rolling Mill Company as collateral security, they would be *bona fide* holders for value and entitled to enforce the payment of the bonds, as long as the debts for which they were hypothecated were unsatisfied: *Wheeler v. Newbould*, 16 N. Y., 392; *Alexandria, etc., R. R. Co. v. Burke*, 22 Grat., 254; *Goodman v. Simonds*, 20 How., 343.

The claim is further interposed by the railroad company that there was an understanding that the coupons due January 1, 1878, were to be cut from said bonds delivered to the Kansas Rolling Mill Company before the same were so delivered. The proof utterly fails to sustain this claim. The agent of the Kansas Rolling Mill, who was engaged in transacting this business, swears that they never heard of any such understanding until it was set up in the answer of the railroad company, and the joint written order of Henderson and Gaston, the president of the railroad company, dated November 2, 1877, is produced, directing the trustees of the trust deed to deliver to Harris, trustee for the Kansas Rolling Mill Company, the one hundred and ninety bonds in question, "to be held by him as collateral security for the payment of iron delivered in Dallas to the said company, pursuant to contract." In this order nothing is said about detaching the coupons due January 1, 1878, and the proof shows that the Rolling Mill Company was entitled to the possession of one

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hundred and twenty-five of these bonds as early as May, 1877. As to the sixty bonds held by Alexander Calder, it is not claimed that the coupons due January 1, 1878, were not properly transferred with them.

I conclude, therefore, that the 250 bonds of the railroad company were issued and put in circulation, that they are held *bona fide* and for value by either Alexander Calder and the Kansas City Rolling Mill Company or those to whom they have been transferred, and that default has been made by the company in the payment of the interest due January 1, 1878.

3. It remains to consider whether there was any necessity for the appointment of a receiver, and whether, under all the circumstances as they now appear, a receiver should have been appointed.

In my judgment, independent of any necessity for the appointment of a receiver to protect and preserve the trust property, it was the right of the bondholders, under the terms of the trust deed, to have a receiver appointed to take possession of the trust property.

The rights of holders of negotiable bonds issued by a railroad company and secured by a mortgage on its property are not to be measured by the same rules as are applied to an ordinary mortgage of a farm or house and lot, to secure one or two notes held by one mortgagee.

In this case the trust deed pledged the receipts and income of the railroad property for the payment of the principal and interest of the bonds. It declared that after three months' default in the payment of the principal or interest on the bonds, or any part of either, upon the written request of one-tenth of the holders of the bonds, it should be competent and lawful for the trustees to enter upon and take possession of the trust property, and upon the written request of one-tenth of the holders of the bonds, it should be the duty of the trustees to enter upon and take possession of the trust property, and to use and employ the said railroad and the property and appurtenances proper for its use, to make all necessary repairs, pay all proper expenses of the management thereof, including taxes, and to apply the proceeds to the payment,

pro rata, of the principal and interest due on the bonds. In short, it was made the duty of the trustees, in the contingency named, to exercise the rights and perform the duties of receivers appointed by the court.

These provisions were inserted in the deed of trust to give credit to the bonds, to enhance their value and induce capitalists to purchase them. They constituted a part of the consideration which the railroad company offered to purchasers of its bonds: *State of Maryland v. The Northern Central R. W. Co.*, 18 Md., 193; *Dumville v. Ashbrook*, 3 Russ., 99 (3 Eng. Chy.), note c.

A mere default in the payment of the debt is no ground for the appointment of a receiver, but this is not true where there is a stipulation in the mortgage that the mortgagee shall have the rents: *Whitehead v. Wooten*, 43 Miss., 523; *Morrison v. Buckner*, 1 Hempst., 442.

Are all these provisions of the deed of trust to be disregarded? If not, are the rights of the bondholders impaired by the fact that the trustees, instead of taking possession of the trust property, as they had a right, and it was their duty to do, have applied to this court to assist them in the execution of the trust whose duties they had assumed. These trustees might, as is sometimes done, have first taken possession of the trust property, under the authority of the trust deed, and upon written demand of one-tenth of the bondholders, and afterwards filed their bill asking the court to protect their possession and aid and instruct them in the discharge of their trust. Such a course would have been perfectly proper and competent. But having chosen to file their bill in the first instance, neither they nor any bondholder has lost any right, and it is the clear duty of the court to give them all the rights conferred by the deed of trust.

By the terms of this trust deed the bondholders, upon default in the payment of interest, are entitled to have the income and profits of the trust property applied to the payment of their debt. This can be done only by possession taken of the trust property, either by the trustees or a receiver. By a failure to take possession the bondholders

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are in danger of losing their right to the income and profits: *American Bridge Co. v. Heidelberg*, 94 U. S., 798.

It is evident that the rules applicable to the appointment of a receiver upon an ordinary mortgage do not apply here. The bondholders are not precluded from the appointment of a receiver because it is not shown that the property is insufficient to pay the mortgage debt, that the mortgagee is insolvent, or that the trust property is in jeopardy, or because the amount due is in dispute, etc.

For instance, are the rights of Alexander Calder to proceed on his sixty bonds, no part of which are in dispute, to be affected because some unfounded claim is set up, that some of the coupons due January 1, 1878, held by the Kansas Rolling Mill Company, are not justly due? The rights of one holder of bonds are not to be impaired because some dispute may be started affecting the rights of another holder: *High on Receivers*, Sec. 387.

The value of railroad bonds, as commercial paper, depends in large degree upon the punctual payment of the interest as it falls due. The trust deed has therefore provided not only a pledge of the income and profits of the trust property to pay the interest and principal of the bonds, but has pointed out the method by which, in default of the company to pay the interest, the bondholders may compel the application of the issues and profits to its payment as it matures.

Therefore, under the terms of the trust deed, I should feel compelled, upon demand made upon the trustees by one-tenth of the bondholders, to appoint, upon a bill filed for that purpose, a receiver, through whose agency the bondholders could enjoy all their rights, and it would be no answer to such an application to say that the trust property was sufficient to pay all the bonds, or that some of the bonds were in dispute, or that the *corpus* of the trust property was in no danger.

Regarding, therefore, only the terms of the trust deed upon proof of a three months' default in the payment of interest, and of a written request made by one-tenth of the holders of the bonds upon the trustees, that they exert the powers conferred upon them by the trust deed, it would be

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the duty of the court, without further showing, to appoint a receiver, so that the value of the bonds, as commercial paper, might be preserved, and all the rights of the bondholders secured.

But independent of the peculiar terms of the trust deed, the situation of the trust property, as shown by the evidence, was such as, in my judgment, to justify and require the appointment of a receiver at the time when the application was first made.

It sufficiently appears that the main reliance of the railroad company for means to construct its road, was on the sale of its first mortgage bonds. It is true, it had a land grant from the state, but this could only be secured as the sections of the road were completed, and could only be used as a means of affording additional security and value to the bonds.

The condition of the railroad company on May 24, 1878, the date at which the receiver was appointed, appears by the proof to have been as follows:

The company had issued its bonds to the amount of \$250,000, on which the coupons due January 1, 1878, were unpaid, and the bonds held as collateral security had been sold in New York city, at fifty cents on the dollar. The company had allowed judgments to be recovered against itself, on which executions had been issued and the company's property advertised for sale, and on one judgment a sale had been actually made. In short, the company was insolvent, and without means either to pay the interest on its bonds, or to construct its road.

Malcolm Henderson, with whom the railroad company had contracted for the construction of its road, had failed, and had abandoned the work of construction. Reed, who appears to have been a subcontractor under Henderson, or in some way connected with him, was in possession of the railroad, about eighteen miles of which had been completed, and was receiving its issues and profits. As already stated, if twenty miles of the railroad were not completed by July 1, 1878, the charter of the railroad company and its land grant would become forfeited, and the security of the bondholders be entirely

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lost. There was not sufficient iron on hand to complete the road for the remaining two miles, necessary to be completed to save the charter and land grant. This was the condition of affairs when the application for the appointment of a receiver was made and granted. It is true, that after the appointment of the receiver, and before the order of appointment had reached the city of Dallas, the defendant Reed, who, according to the answer of the railroad company, was engaged in the construction of the railroad under a contract with Henderson, had, as he alleges, entered into a contract with a competent engineer to complete said railroad a distance of nineteen and a half miles by June 7. But by the showing of the railroad company and of Reed, no such contract had been made when the receiver was appointed. The significant and unexplained fact remains, however, that even this contract did not provide for the completion of the road for the distance of twenty miles in due time to avoid the forfeiture of the charter and the land grant. It is true that the railroad company, speaking by Gaston, its president, says that it had no doubt that Reed would have completed the road for the distance of nineteen and one-half miles by June 10, and upon information and belief, that he could have completed the road for the distance of twenty miles by July 1, and that the president of the railroad company had received assurance and ample indemnity from Reed that he would have finished the road the distance of twenty miles by July 1, and Reed declares in his answer his purpose to have finished the road the distance, and within the time necessary to save a forfeiture of the charter.

In what shape the assurances received by the president from Reed, whether verbal or in writing, is not shown. What the ample guarantee was is not stated. Could it be expected that a court, where interests amounting to more than \$250,000 were depending, should be satisfied with such a showing as that?

If Reed intended, in good faith and without seeking any undue advantage, to construct the twenty miles of road by July 1, why did he not contract with competent engineers to

construct the road to the twenty mile point, and not to the nineteen and a half mile point? If he intended to allow the use of the road which was in his possession to carry the iron necessary to lay the last half mile, why did he decline to enter into a contract to that effect, as required by the city council of Dallas?

Stevens, who was the engineer with whom Reed contracted to build the road to a point nineteen and one-half miles distant from Dallas, swears that Reed would not contract for laying the track to the twenty-mile post, and refused to provide the necessary material for that purpose.

The condition, in short, was this: the railroad was insolvent and its property under execution, it was unable to furnish means to complete the twenty miles of its road in time to save the forfeiture of its land grant and charter. Henderson, the person with whom the company had contracted for the construction of its road, was insolvent and had abandoned the work. When the receiver was appointed there was no provision made by contract for completing the twenty miles, and it was three days after the appointment of a receiver that Reed, a subcontractor under Henderson, entered into a contract with Stevens for the completion of the road for the distance of nineteen and one-half miles.

It seems to me that, under this state of facts, when such fatal consequences to the interests of the railroad and bondholders were threatened, it was the duty of the court to interfere by the appointment of a receiver, and that it would have been an indefensible trifling with the rights of others if the court had refused the application, relying on the assurance, fairly presumed to be verbal, which Gaston says he received from Reed that the latter would complete the road twenty miles by July 1, and on the guarantees which Gaston says he received from Reed, but whose nature he does not reveal.

It is urged in behalf of the possession of Reed, which was displaced by the receiver, that Henderson's contract for construction antedated the deed of trust and provided that Henderson should retain the possession of the road and receive its issues and profits until the completion of the contract of con-

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struction, and that Reed had all the rights of Henderson, and his right to possession and use and enjoyment of the railroad under the construction contract was older and better than the rights of the trustees named in the trust deed.

Conceding that Reed stands in the shoes of Henderson, what were Henderson's rights under the facts? He transferred, as collateral security to the Rolling Mill Company, one hundred and ninety bonds secured by a deed of trust which, on a certain default, gave the trustees the right to take possession of the railroad company's property and receive its rents and profits. As between him, therefore, and the trustees, he would be estopped from asserting his right of possession under his contract for construction. The transfer of the bonds, secured by such a deed of trust, was a clear waiver of his rights under his contract. So that neither Henderson nor Reed can be heard to claim possession as against the trustees of the deed of trust.

It has been urged by counsel for the railroad company that the plaintiff is never entitled to a receiver when the equities of the case are fully and fairly denied by the sworn answers of the defendant. This is true when the motion for a receiver is heard on bill and answer only. But when there is other evidence besides the bill to support the application, the court will consider whether the evidence adduced in support of the bill does not overcome the denials of the answer, and if they do, the receiver will be appointed, notwithstanding the denials of the answer: *Thompssen v. Diffendenfer*, 1 Md. Ch., 489; *Simmons v. Henderson*, Freem. Chy. (Miss.), 493; *Henn v. Walsh*, 2 Edw. Ch., 129; *Buchanan v. Comstock*, 57 Barb., 568; *Fairbairn v. Fisher*, 4 Jones Eq. (N. C.), 390; *Callanan v. Shaw*, 19 Iowa, 183; *Rhodes v. Lee*, 32 Ga., 470.

It is in all cases a question of evidence. If on a consideration of all the proof, the court thinks a case is made for the appointment, a receiver will be appointed, notwithstanding the denials of the answer.

In this case, it seems to me that the proof to justify the appointment was ample.

But in the view I have taken of the case, the answer does

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not deny the equities of the bill. On the contrary, enough is admitted fully to warrant the appointment, namely, the terms of the trust deed, the issue of at least \$125,000 in bonds with all coupons attached, for a valuable consideration, default in the payment of the interest for three months, and the demand of the bondholders on the trustees that they should execute the powers conferred by the trust deed.

It has been ably insisted that the interests of the railroad company and of the people of a large part of the state of Texas will be injured by the action of the court, and that these considerations ought to aid the discretion of the court in coming to a conclusion adverse to the appointment of the receiver.

These considerations cannot weigh when the rights of creditors are involved. But so far as the railroad corporation is concerned, it cannot justly complain. And as to the people of Texas, it seems clear to me that they are interested only in the railroad, and are not at all concerned about the railroad company. The appointment of a receiver does not put an end to the construction of the railroad. It only takes it from the hands of an incompetent and insolvent corporation and gives it to other and more vigorous agencies.

My conclusion upon the whole subject is, that if on May 24, when the receiver was appointed, the same evidence had been presented and the same arguments made as have been on this hearing, I should have felt constrained to appoint a receiver according to the prayer of the bill.

Finally, a sufficient reason why the order appointing the receiver should not be revoked is, that the motion for that purpose comes too late.

The receiver appointed by the court went forward promptly and vigorously in the discharge of his duties, and within the time limited he completed the railroad to the twenty-mile point, and thus saved the forfeiture of both the railroad charter and land grant. In doing this he expended the sum of five thousand dollars. The iron necessary to complete the track was furnished by the Kansas Rolling Mill Company.

The receiver took possession of the railroad on May 29, of

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course with the full knowledge of the railroad company and of Silas Reed, who, up to that time, had been in possession. It was not until June 26 that notice of the present motion was given. The officers of the railroad company, as soon as the receiver took possession of the road, learned how the notice of the motion to appoint the receiver had been served, to wit, on Calder, the vice-president. If they intended to claim that the notice was insufficient and defective, it was their duty to move at once. The delay of nearly a month, while the receiver was going on with the construction of the road and expending money and materials, furnished certainly not by the railroad company, but by others interested in its prosecution, was an acquiescence in the action of the court, and they are estopped now from making objection. It was not until the receiver had completed the railroad to the twenty-mile post and secured the railroad charter and land grant from forfeiture that notice of this motion was given.

On the whole case, I am well settled in the opinion that the motion to vacate the appointment of the receiver should be overruled, and it is so ordered.

AUSTIN, JUNE TERM, 1878.

THE UNITED STATES v. WILLIAM T. SCOTT ET AL.

1. A judgment rendered by the United States circuit court for the western district of Texas is a lien upon all the lands of the defendant within the district, without being recorded in the several counties where his lands lie.
2. Where a suit in equity is submitted on bill and answer, the answer must be taken as true, and where it denies the case made by the bill, the bill must be dismissed.

IN EQUITY. Heard on bill and answer.

This was a bill filed to set aside a deed for fifty-seven sections of land made by the defendant William T. Scott to his

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co-defendant Hiram G. Austin. The bill alleged in substance as follows: Scott was surety on the bond of the late collector of internal revenue, who had died in default to the United States in the sum of \$127,000. The penalty of the bond was \$50,000. Suit was brought against Scott, on said bond, in United States circuit court for the western district of Texas, and on December 11, 1873, a judgment was rendered against him, in favor of the United States, for the full amount of the penalty of the bond.

That on October 3, 1873, Scott was the owner of fifty-seven sections of land in Bexar county, in the western district of Texas. On that day he was largely indebted to the United States, and in failing circumstances. Nevertheless, he made a deed of that date for said land to his son-in-law, the said Austin. This deed was not acknowledged until December 15, 1873, and was not recorded till January 14, 1874. Austin, at the date of the deed, knew of the pendency of the suit against Scott. The deed was without consideration, and was made by Scott and accepted by Austin, as a device to hinder, delay and defraud the creditors of Scott, and especially the United States.

The bill further averred that, by virtue of its judgment, the United States had acquired a lien upon said lands, and that said conveyance was a cloud upon the title. The bill prayed that said deed might be declared fraudulent and void, and the lands subjected to the payment of the judgment against Scott, in favor of the United States.

The answer denied that the judgment was a lien upon the lands, and traversed all the averments of fraud made in the bill.

The cause was submitted on bill and answer.

Mr. A. J. Evans, United States attorney, for the United States.

Mr. C. S. West, for defendants.

BRADLEY, Circuit Justice. The defendants contend that the judgment was not a lien upon the lands until it was recorded in the county where the lands lie. I do not think

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this position is tenable. The judgment is a lien upon all lands in the district within the jurisdiction of the court, and within reach of its process.

But whether so or not is not a question in this cause, since that is a matter affecting the legal rights of the parties. This suit was brought to remove the cloud on the title which it was supposed the deed created, and was based on an allegation that the deed was made to defraud the United States. The defendants answered the bill fully, denying all fraudulent intent, averring that the deed was made *bona fide* and for full consideration, and without any reference to the action against Scott, he supposing, as he swears, that there was a good and valid defense to the suit. The plaintiff set the cause down for hearing on bill and answer only, and the answer must be taken as true. The charge of fraud being purged by the answer, and the bill being unsupported by evidence, the bill must be dismissed. Dismissed accordingly.

ROBERTO VIESCA v. H. C. WYCHE.

1. Under the statute law of Texas, it is not necessary, in an action of trespass to try title, to prove an actual trespass by defendant, except in cases where there is no controversy about the title, but only as to boundaries, and where the plaintiff having the superior title charges the defendant with trespassing on his land.
2. The document offered in evidence in this case as a link in plaintiff's title, dated at Monclova, March 18, 1835, signed by José Benito Camacho Y. Estrada, as deputy secretary, or second clerk, purporting to be an appointment by José Maria Cantu, *ad interim* governor of Coahuila and Texas, of José Maria Balmaceda, as commissioner for the distribution of lands to the colonists of the empresarios McMullen and McGloin, is valid and genuine.
3. The document purports to be an original or protocol, has all the appearance of being such, is authenticated by the seal of the state, and there is no suggestion that it is a forged instrument.
4. The fact that the document is signed by the deputy and not by the principal secretary, is not fatal to its validity. The deputy secretary was considered competent at that time to sign decrees of the government.

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5. In this case the principal secretary, José Maria Falcon, was the attorney of Viesca, the grantee of the title, and made the application to the governor for the identical appointment in question; hence there was a propriety in his not signing it.
6. A document shown to be a genuine original act of the government, is proper evidence of the appointment or decree which it embodies.
7. The proper depository for such a document is among the archives of the state. But its absence therefrom is not fatal to its authenticity, but may be explained.

Before BRADLEY and DUVAL, JJ.

This was an action of trespass to try title. The case turned wholly upon questions of law. A jury was impaneled *pro forma*, to which instructions were given by the court, and, in accordance therewith, they were directed to return a verdict for plaintiff.

Mr. Wm. M. Walton, for plaintiff.

Messrs. Bethel Coopwood, F. W. Chandler and Wm. McGregor, for defendant.

The bill is claimed to have issued by virtue of a special commission to Balmaceda, and this authority is questioned upon the ground that it is neither a matrix in the archives of the state department, nor testimony of such, in contemplation of law.

That it is competent to question the authority of the officer issuing, is well settled: *The United States v. Arredondo*, 6 Pet., 691.

If it appear that he was not legally authorized to grant the title, then it is void and cannot be used as evidence of title: *The State v. Delesdenier*, 7 Tex., 76; *Sampeyreac & Stewart v. The United States*, 7 Pet., 222; *Stoddard v. Chambers*, 2 How., 284.

The protocols or commissions of commissioners or alcaides to make titles to purchasers remained in the archives of the executive department of the state of Coahuila and Texas: *Paschal v. Perez*, 7 Tex., 348; *The United States v. Sutter*, 21 How., 170; *Luce v. The United States*, 23 How., 515; *Palmer v. The United States*, 24 How., 125.

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Copies of such decrees must be authorized (authenticated) by the secretary, and "without this requisite they shall not be obeyed, or be productive of faith" (sec. v, art. 141, constitution C. and T.), and this article fully contemplates that originals signed by the governor and secretary shall remain in the archives, and a copy thereof issued to the party, attested by the secretary.

The secretary shall sign every copy emanating from the office under his charge: Laws of C. and T., p. 31, sec. iii, art. 51.

In *Mitchel v. United States* (9 Pet., 723), the court said: "The original is a record, and preserved in the office, which cannot be taken out; a *testimonio*, or copy, is delivered to the party."

Such copies (*testimonios*) must come accompanied with the certificate of the keeper of the public archives, who declares or certifies to have copied them by order of the king (governor): White's Rec., vol. 1, p. 297; *Paschal v. Perez, supra*.

The *testimonio* of a decree of concession, set out in *Jenkins v. Chambers*, 9 Tex., 167, shows how such executive orders are authorized or authenticated by the secretary.

It is believed that the article of the constitution of C. and T., *supra*, and decree of No. 102, of the laws of Coahuila and Texas, fully authorize the retention of the original in the archives of the state department, as stated in *Paschal v. Perez, supra*, and it is the copy (*testimonio*) which serves as the officer's commission in his possession, to attach to the act or deed as his authority to grant it.

The commission is a document issued or made by an officer in matters pertinent to the offices he exercises with public authority, and is an authentic document (Roa Barcena's Manual, p. 44), and subject to the rules governing the execution of such; and the rule is, "that the officer authenticates it with his signature and seal, and puts it and retains it in his book of protocols, or register, a sealed copy of the instrument not to be given to the party without these requirements being complied with, under penalty of the copy being null," etc. :

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Escriche, p. 889; L. 54, tit. 18, part 3; L. 3, tit. 8, lib. 1, del Fuero Real; L., s. 1 and 6, tit. 25, tit. 10, Nov. Rec.

The instrument, without a protocol, has no authority, and documents made by governors are subject to the rule: *The United States v. Sutter, supra*; *Luco v. U. S., supra*; *Palmer v. U. S., supra*.

It seems Balmaceda took from his pocket, just as the government was about to be changed by revolution, an original document, without a protocol or counterpart in any of the public archives, and claiming none such, and attached it to a title extended by him, as the only manifestation of authority in him to issue the same. It is believed that the rule is well established that such documents are no authority in the hands of an individual who proposes to act or claim rights under them.

BRADLEY, Circuit Justice, instructed the jury as follows: The defendant claims a verdict in this case because the plaintiffs have failed to prove that he was in possession of, or had committed any trespass upon the premises described in the petition, or any part thereof. On this point the statute of 1840, section six, is very explicit, declaring that "it shall not be necessary to prove an actual trespass on the part of the defendant to support this action," meaning the action of trespass to try title. It was decided, however, in the case of *Strond v. Springfield*, 28 Texas, 649, that it is necessary to prove trespass when there is no controversy about the title, but only as to boundaries, and where the plaintiff, having the superior title, charges the defendants with trespassing on his land. That decision was clearly right, for, in that case, unless the plaintiff could prove that the defendants had trespassed on his land, he had no cause of action against them, since they conceded his title to be good, and merely questioned the fact that their occupation was within the boundaries of his title. But the statute certainly applies to cases where the title is disputed, whether the defendants have actually attempted to take possession or not. The adverse title, or contestation, set up by them is a sufficient trespass

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the lands to which they related. This document is found, with the other title papers in the case, bound up amongst the public archives of the land office. These particular papers (relating to the present title) were deposited in the office by Col. Volney E. Howard, in 1846, and probably came from the archives deposited at San Antonio—the most likely and natural place to look for them. Being a genuine instrument, found in connection with the other title papers in the case, at a place where it would most likely be (if not retained amongst the original archives at Monclova or Sattillo), we think that its presence here, especially in view of the great lapse of time which has intervened since it became a part of the public archives of this state, ought not to cast discredit upon its validity. The authorities to which I have been referred by defendant's counsel seem to relate more especially to acts passed before a notary between private persons, and not to public acts of the government.

Something was said on the argument about irregular grants having been made by Governor Cantu, which were afterwards disapproved by the congress, but it does not appear that this was one of them. This was merely the appointment of a commissioner for carrying out a previous concession made several years before.

We think the document must be received as evidence.

This being the only remaining question in the case, the verdict must be for the plaintiffs.

DUVAL, District Judge, concurred.

JOHN S. YOUNG ET AL. V. JAMES PORTER ET AL.

1. Where complainants in a bill in equity to recover lands of which the defendants were in possession, claimed only an equitable title thereto, and did not set up any facts tending to show that the defendants were in any way affected by their equity: *Held*, that the bill could not be maintained.
2. The bare fact that parties who hold an equitable title to land cannot sue at law, does not give a court of equity jurisdiction.

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8. The remedy of parties so situated is first to obtain the legal title, and then bring their action at law against the parties in possession of their land.

IN EQUITY. Heard upon demurrer to the bill for want of equity.

Mr. D. E. Thomas, for complainants, cited *Jackson v. Morsa*, 16 Johns., 196; *Bogert v. Perry*, 17 Johns., 350; *Fenn v. Holme*, 21 How., 481; Tyler on Ejectment, 43, 44.

Mr. A. J. Peeler, for defendants, cited *Orton v. Smith*, 18 How., 263; *Herrington v. Williams*, 31 Texas, 448.

BRADLEY, Circuit Justice. The bill in this case is filed to recover 640 acres of land, of which the defendants are in possession. The complainants admit that they have not the legal title to the land, but they claim the equitable title; and it is because they have only the equitable title, and cannot maintain an action at law, that they come into a court of equity. They do not state that the defendants have the legal title or that they obtained possession under any person who had it. They do not state any facts going to show that the defendants are in the least affected by the equity which they, the complainants, set up. They only state that the defendants have wrongfully possessed themselves of the land, and are cutting timber and committing other waste thereon. The bill is, in fact, a mere ejectment bill, the only pretense for bringing which in a court of equity is that the complainants cannot maintain an action at law.

We entirely agree with the complainants' counsel in the proposition that the complainants could not maintain an action at law for the recovery of the land. But that does not prove that they can maintain a suit in equity for that purpose. They cannot maintain a suit which is the equivalent of an ejectment, merely because their title is only an equitable one. They must show that the defendants inequitably withhold the possession from them before they can do this. They must show some connection between the defendants and themselves. If the defendants had procured the legal title with notice of the complainants' equities, or were in any

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other respect guilty of fraud or want of equity towards the complainants in detaining the possession from them, then the latter might probably come into equity for relief. But they have not shown any such state of things.

The complainants ask: If we cannot proceed either at law or in equity, what shall we do? The answer is plain: they must first take those proceedings against Alberty or his representatives or assigns which are necessary to obtain the legal title; and having obtained that, then they can bring trespass to try title against the defendants. If they say they cannot find Alberty, they must take those proceedings which the law gives to bring him into court by advertisement, or other constructive service. At all events, a suit in chancery cannot be maintained against the defendants, unless something more is shown against them than is shown in this bill.

The bill must be dismissed.

AUSTIN, JANUARY TERM, 1879.

THOMAS J. DAGGS V. JAMES B. EWELL ET AL.

1. According to the jurisprudence of Texas, the lien of a judgment creditor without notice is superior to the unrecorded deed of the vendee of the defendant in execution.
2. The position of a *bona fide* mortgagee is still stronger, for he stands in the plight of a purchaser.
3. A deed of lands to a purchaser without notice, duly recorded, cuts off any claim thereto founded on a resulting trust.
4. The repeal of a usury law which forfeited all interest upon the usurious contract leaves the contract in full force, according to its terms, and no forfeiture of interest imposed by such law can be enforced.
5. The adoption by the state, after such repeal, of a constitution imposing penalties for usurious contracts, can have no effect upon such contract.
6. A statute of limitation which cannot be pleaded against a note secured by a mortgage, cannot be pleaded against the mortgage.
7. Where a mortgage on lands is executed by the holder of the legal title duly recorded, to a mortgagee without notice of any outstanding

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equitable title, no defenses against the mortgage are open to the equitable owner which cannot be made by the holder of the legal title.

8. Possession of land is constructive notice of the title of the possessor, but being constructive only, its effect cannot be extended to lands outside the limits of the possession, claimed by another party under the same title.

IN EQUITY. Heard upon pleadings and evidence for final decree.

The facts, about which there was little controversy, were as follows:

On May 27, 1856, the defendant James B. Ewell and Mary W. Ewell, his wife, made and delivered to the complainant their promissory note of that date for the payment to his order of \$3,556, three years after date, and to secure the same executed and delivered to complainant a deed of mortgage on a tract of land in Gandaloupe county, Texas, containing sixteen hundred and fifty-three acres of land. Said mortgage was duly proved for record on May 31, 1856, and recorded in the proper office on June 5, 1856.

On March 9, 1872, the complainant began an action at law in this court on the said promissory note against James B. Ewell and wife, and recovered a judgment on July 14, 1873, against James B. Ewell for \$3,530.95, the cause having been discontinued as to Mary W. Ewell, because at the date of said note she was under coverture.

The note and mortgage were taken for complainant, who was a citizen of Virginia, by his agents in Texas. The suit was brought on the note only by attorneys of complainant, who did not know of the existence of the mortgage, the agents having delivered to the attorney the note without the mortgage.

The defense set up by James B. Ewell to the note in the action at law was usury, the consideration of the note being \$2,000 in cash, loaned by complainant to him, and the residue of the amount named in the note being interest at the rate of twenty per cent per annum for the period of three years, computed annually.

The land covered by the mortgage executed by James B.

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Ewell was, in the year 1853, the property of one Edward Dwyer. During that year the defendant George W. Ewell, who was a brother of James B. Ewell, made a contract for the purchase of the said premises. He paid, very soon after the making of the contract, to wit, in March, 1854, the cash payment, and on April 13, 1854, by deed of that date, Dwyer conveyed the land, not to George W. Ewell, the purchaser, but to James B. Ewell, his brother. This deed was soon after recorded in the proper office. This conveyance was made by Dwyer to James B. Ewell without the knowledge, consent or authority of George W. Ewell. The entire purchase money for the land was paid by George W. Ewell, who bought for himself alone. His brother had no part whatever in the purchase of the land or in the payment of the consideration. The excuse given by James B. Ewell for the conveyance of the land to himself, and not to his brother, was that Dwyer wanted a mortgage to secure the deferred payment, and as George W. Ewell was living at a distance, it was more convenient to make the deed to James B. Ewell and take a mortgage from him.

George W. Ewell, having paid the entire consideration for the land, discovered, in September, 1856, for the first time, that Dwyer had made the deed therefor to his brother, James B. Ewell, and he at once demanded of James B. a conveyance of the land to himself as its rightful owner, and on September 6, 1856, James B. Ewell conveyed, by deed of that date, the land to his brother George W. Ewell, and this deed was soon after recorded in the proper office.

George W. Ewell never learned of the mortgage on said land given by his brother, James B., to the complainant until September, 1873.

On December 4, 1855, George W. Ewell sold 555½ acres of said tract of land to one James B. Wilson, and gave him a bond for title, and on March 1, 1857, made him a deed for the land so sold to him. During the years 1855, 1856, 1857 and 1858, James B. Wilson resided on the tract of land purchased by him of George W. Ewell, and made improvements and paid the taxes thereon.

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When the mortgage to Daggs was made by James B. Ewell, neither Daggs nor his agent had any actual notice of the equity of George W. Ewell in the land which the mortgage conveyed, and the only constructive notice of any title adverse to that of James B. Ewell was the possession by Wilson of 555½ acres of the tract covered by the mortgage, and Daggs had no actual notice of that possession.

In short, the testimony established, on the one hand, that the mortgage was taken by Daggs in good faith, to secure a loan of money made by him to James B. Ewell, who held the legal title to the land, without notice to Daggs of any equitable title in any one else, save the constructive notice arising from the possession by Wilson of a part of the tract, and, on the other hand, that George B. Ewell bought the land in good faith for himself, paid for it with his own money and never had any notice till September, 1856, that the title had been made to his brother, James B. Ewell, save that constructive notice arising from the registration of the deed to James B. Ewell in 1854, and never had any notice of the mortgage to Daggs till September, 1873.

Messrs. Wm. M. Walton and John A. Green, for complainant.

Messrs. A. M. Jackson and David Sheeks, for defendants.

WOODS, Circuit Judge. The case presented in the bill of complaint, which is simply a suit to foreclose a mortgage given to secure a note made by the mortgagor, ought to prevail unless the defendants have succeeded in making good some one or more of the defenses set up by them.

The defense made by the heirs of James B. Wilson, who was in possession of 555½ acres of the mortgaged premises at the time the mortgage was executed, claiming title thereto under a bond for title given by George W. Ewell, the equitable owner of the land, is conceded by complainant to be good, his possession being constructive notice to Daggs, or his agent, of the equitable title of Wilson. The only controversy is, therefore, between Daggs and George W. Ewell.

It is the settled jurisprudence of Texas, that even the lien

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of a judgment creditor, without notice, is superior to the unrecorded deed of a vendee of the defendant in execution: *Grace v. Wade*, 45 Texas, 522. The case of a *bona fide* mortgagee, without notice, is much stronger, for he stands in the plight of a purchaser.

The claim of defendant George W. Ewell, that the registration laws of the state have no application to his equity in the mortgaged premises because the same was a resulting trust, will not hold.

The defendant George W. Ewell, sets up, by way of defense, that the note to secure which the mortgage was given, was usurious, that the real consideration was \$2,000, money loaned; and that the residue of the amount for which the note was given, was made up of interest at twenty per cent per annum; that at the date of the note, the laws of Texas forbade the taking or receiving of interest more than twelve per cent per annum, and forfeited all interest if that rate was exceeded. He claims that payments have been made on the note to the amount of \$1,745, which should be deducted from the principal, leaving only \$255 due.

It seems to us to be a conclusive reply to this defense, that before suit was brought on the note, the constitution of Texas of 1870 went into effect, and by virtue of its provisions, repealed all existing usury laws, and this constitution continued of force until after the recovery of the judgment. (See sec. 4, art. 12, constitution of 1870.) This left the contract, as made by the parties, in full force, and no forfeiture or penalty for the usury could be visited upon or against the party holding the usurious contract: *Wood v. Kennedy*, 19 Ind., 68. The doctrine seems to be well founded in principle and authority: *The United States v. Ship Helen*, 6 Cranch, 203; *Norris v. Crocker*, 13 How., 429; *State of Maryland v. B. & O. R. R. Co.*, 3 How., 534.

The fact that the constitution of 1876 provided penalties for usurious contracts, could have no effect on a contract which, at the time of the adoption of that constitution, was valid and binding.

The defendant George W. Ewell claims to be protected

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against a decree of foreclosure by the limitation of four years prescribed by article 4604 of Paschal's Digest of Laws, which declares that "all actions of debt grounded upon any contract in writing, shall be commenced and sued within four years next after the cause of such action or suit, and not after."

The complainant replies to this, that he has already brought suit on the note secured by the mortgage, and recovered judgment thereon, and that the limitation cannot be pleaded as against the mortgage which is a mere incident to the note.

Unquestionably this reply would be a good one to the defense of limitations, if set up by James B. Ewell, the maker of the note and mortgage. So far as he is concerned, the note not being barred, the mortgage is not barred.

Thus, in *Eborn v. Cannon's Admr.*, 32 Texas, 231, the Supreme Court says: "If the notes were a subsisting debt at the time of the institution of the suit, not barred by the statute of limitations, the mortgage executed contemporaneously to secure their payment was still valid as long as the debt remained unsatisfied. No matter at what time the power of the court was invoked for its correction and foreclosure, and for a decree to subject the mortgaged property to the satisfaction of the debt, it was opportune, if the jurisdiction of the court over the debt itself was not ousted. The mortgage was but an incident of the debt, and the incident in law, as in logic, must abide the fate of its principal." See, also, *Perkins v. Sterne*, 23 Texas, 561; *Duty v. Graham*, 12 Texas, 427; *Flanagan v. Cushman*, 48 Texas, 241.

But George W. Ewell insists that, conceding that the mortgage is not barred as to James B. Ewell, yet it is as to him, that he can be in no worse plight than if he had signed the note and mortgage, and if he had done so the lapse of time would have barred any relief as against him. There seems at first sight to be much strength in this position, but we do not think it will stand scrutiny.

The legal title to the mortgaged premises was in James B. Ewell, and if the mortgagee was, at the date of the mortgage, without notice, either actual or constructive, of the equity of George W. Ewell, then he is not affected by that

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equity. He is in the same position that he would be if George W. Ewell's estate in the land commenced with the date of the deed made to him by James B. Ewell, in September, 1856.

If this view is correct, then George W. Ewell is in the same position of any other vendee of a mortgagor whose deed bears date subsequent to the mortgage. He cannot set up any defense to the mortgage which is not open to the mortgagor. He is in no better position than the mortgagor. The mortgagor cannot confer on him any rights which he does not possess himself.

It follows, from this, that George W. Ewell, so far as his equities in the mortgaged premises were concerned, was bound by the judgment on the note against James B. Ewell. In other words, he was the privy in estate of James B. Ewell, and, so far as his estate in the land was concerned, was bound by what bound James B. Ewell. If the mortgage was good against James B. Ewell, it was good against him. If it was not barred as to James B. Ewell, it was not barred as to him. These views apply with like effect to the defense of usury. If that defense was closed as to James B. Ewell, it was also closed as to George W. Ewell.

We are of opinion, therefore, that as the mortgage in suit is not barred as against James B. Ewell, it is not barred as against George W. Ewell, and, therefore, that the defense of limitation and staleness of claim set up by George W. Ewell must fail.

It was strongly urged by counsel for George W. Ewell that as complainant conceded that the possession by Wilson of five hundred and fifty-five and one-half acres of the mortgaged premises was notice of his equity, that his possession of a part was notice to complainant of the condition of the title to the entire tract, that Wilson being in possession of a part, complainant was bound to inquire as to his equities, and such inquiry would have revealed the equities of George W. Ewell.

We think this position would be sound if the complainant had had actual notice of the possession of Wilson. In that case he would, on inquiry as to Wilson's rights, have learned

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of the defect in James B. Ewell's title, and would have been bound to follow up the inquiry with diligence, and such inquiry would have revealed the equities of George W. Ewell. But it is not shown that complainant or his agent had any actual notice of the possession of Wilson. The possession of Wilson was, therefore, constructive notice to him of Wilson's rights only, and that notice, being constructive, could not extend its effects beyond Wilson's possession: *Watkins v. Edwards*, 23 Tex., 443. The case seems to be one where the equities are equal. In such a case the legal title which is in the mortgagee must prevail.

After considering with care the several defenses set up against the decree sought by complainant, we are of opinion that none of them can prevail, and there must be a decree of foreclosure and sale of so much of the mortgaged premises as are not covered by the claim of the heirs of Wilson.

GEORGE HANCOCK v. WILLIAM C. WALSH, COMMISSIONER OF
THE GENERAL LAND OFFICE OF TEXAS.

1. A bill filed against the commissioner of the general land office of Texas to restrain him from allowing locations of land within the limits of a grant made to a party under whom complainant claimed, and which was afterwards confirmed by the state of Texas, is not a suit against the state.
2. The colonization contract made by the republic of Texas, acting by Samuel Houston, president, on January 22, 1844, with Charles Fenton Mercer, was valid and binding on the republic.
3. By the terms of the joint resolution of the congress of the United States for the annexation of Texas as a state in the Union, she was allowed, as one of the conditions of annexation, to retain the vacant unappropriated lands within her limits, to be applied to the payment of the debts and liabilities of the republic of Texas. This resolution having been assented to by the convention of Texas, it is not within her power to refuse compliance with its conditions.
4. Whether the resolution of annexation, and its acceptance by Texas, is to be considered as a treaty or a contract, it is equally binding on the state, and she cannot escape from its obligation.
5. A state may become a trustee.

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6. A trust assumed by the republic of Texas was not extinguished by the formation of the state of Texas and her annexation to the Union, but was fastened upon the state as the sovereign successor of the republic.
7. Neither lapse of time nor any defense analogous to the statute of limitations can be set up by the trustee of an express trust, as a defense to his liability to execute the trust.

IN EQUITY. Heard on demurrer to the bill and on motion for injunction *pendente lite*.

The original bill was filed on March 6, 1875, by George Hancock, a citizen of Kentucky, against J. J. Groos, who at that time was commissioner of the general land office of the state of Texas.

After the filing of the original bill, to wit, on August 27, 1875, Hancock, the complainant, died, and the suit was revived in the name of William Preston, his devisee, upon a bill of revivor, filed January 26, 1876. Afterwards Groos, the defendant, died, and on April 12, 1879, a bill of revivor and supplement was filed against William C. Walsh, his successor in office, who entered his appearance and filed his demurrer to the original and supplemental bills.

The case made by the original and supplemental bills was as follows:

The republic of Texas, after establishing her independence, adopted, substantially, the colonial policy commenced in 1825 by the government of Mexico to induce the settlement and colonization of its lands in Coahuila and Texas. Several acts of the congress of the republic were passed to carry out this policy. By authority of these acts thirteen colonial contracts were entered into by the republic of Texas, through the agency of its president, with various colonial contractors. Among these contracts was one made on January 29, 1844, between Samuel Houston, president of the republic of Texas, and Charles Fenton Mercer, a citizen of Florida, and such associates as he should choose, the original of which is on file in the state department of the state of Texas. By the terms of this contract it was stipulated that Mercer should, within five years from the date of the contract, settle upon so much of the public domain of Texas as was designated in the contract

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as Mercer's colony, and described by metes and bounds, as many immigrant families as he and his associates could induce to move thereon, at the rate of one family for every section of one square mile of vacant and unappropriated land, with the proviso that at least one hundred families should be settled on said lands during every year of the term of five years for which the contract was to run.

In consideration of the performance by Mercer and his associates of their part of the contract, the republic of Texas agreed to convey to Mercer and his associates one section of six hundred and forty acres of land for every family that they should introduce and settle upon said lands, and to make a full and perfect title therefor to him and his associates as soon as they should exhibit to the proper officers the evidence that said families had been settled on the lands embraced within the limits of the colony, and as a premium and recompense for their labor and expenditures in the performance of the contract, the republic of Texas agreed and covenanted to give, grant and convey to Mercer and his associates, or their legal representatives, one section of six hundred and forty acres, or two half sections of three hundred and twenty acres each, for every ten families introduced and settled by them on said lands in pursuance of the contract. Mercer at once entered into possession of said lands and surveyed and occupied the same by his agents and colonists, in conformity with the provisions of the contract, and did manage and control the same as proprietor thereof, and in order to perform the contract on his part, and as authorized by the contract itself, at once organized a joint stock company, which was called "The Texas Association," composed of many men of wealth and character, and he and his associates in said company, in compliance with the stipulations of their contract, gave their time, labor and services to establish said colony, and did introduce and settle upon said lands not less than one hundred families in each and every year of the five years for which said contract was to run, and well and truly performed all the covenants by them to be performed under the terms of the contract, and for the accomplishment of these ends

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they subscribed and paid money exceeding twenty thousand dollars. Twelve hundred and fifty-six families were, in fact, introduced and settled within the limits of said colony within five years after the date of the contract by Mercer and his associates, which, under the terms of the contract, would have entitled them to one thousand three hundred and seventy-six sections of land of six hundred and forty acres each.

On January 29, 1849, the date at which said term of five years expired, Mercer and his associates offered to exhibit to the commissioner of the general land office of Texas proof of the facts above stated, to wit, of the introduction and settlement of said families, and did in fact make a report, which is now on file in the general land office of Texas, giving the number and names of the colonists and families introduced and settled by them within the limits of the colony, verified by affidavit, and with the names of the required witnesses attesting and verifying all the facts therein stated, and showing the strict performance by Mercer and his associates of their covenants in said contract by them to be performed.

The contract between Mercer and the republic of Texas further provided that lands lying within the limits of the Mercer colony, which had not been legally located prior to the date of the contract, should be held subject to be settled by Mercer and his associates for the period of five years, and should be set apart from the public domain and kept free from all future locations and claims, to be colonized in the manner specified in the contract, for the use and benefit of Mercer and his associates. At the date of said contract the republic of Texas was seized by sovereign demesne of all the lands within the limits of the grant to Mercer, and by her statutes held out the promise that in all contracts for colonization an immediate equitable title should rest in the contractor, subject to be divested only upon the non-performance by him of the conditions annexed to the grant. The statutes and contract, taken together, created a trust whereby the state, retaining the legal title, empowered and required her proper officers to convey the legal title to the contractor as

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soon as evidence was produced of the performance of the contract by him. Yet, notwithstanding the premises, the former commissioner of the general land office of Texas proceeded to issue certificates for lands within the colony of Mercer to all persons holding general certificates of location, and to issue patents therefor, and the defendant Walsh continues to issue patents upon surveys made within the limits of the colony, in violation of said contract. By reason of the performance by Mercer and his associates of the terms of the said contract, they became entitled to have and receive a full and perfect title to 1,256 sections of land within the boundaries of said colony, and also 120 sections of premium lands, being ten sections for every 100 families introduced by them and settled in said colony. Full evidence was adduced, and is of record in the archives of the general land office of the state of Texas, that 1,256 families, claiming and holding under said Mercer, were introduced and settled by him upon land lying within the limits of said colony, according to the terms of said contract.

The state of Texas has recognized the constitutionality and binding force of said contract by the decision of her Supreme Court and by the issue to the colonists under Mercer of 1,256 patents for land in said colony, whereby the title to 1,256 sections was conveyed to the said colonists. There were more than 1,000,000 acres of land lying within the limits of Mercer's colony which have never been located and patented, but remain vacant, and are subject to terms of the contract between the republic of Texas and Mercer, and should, in equity, be reserved for the fulfillment of said contract, and, under the statutes of the state of Texas, it is the duty of the commissioner of the general land office to issue to complainant and his associates certificates for the lands to which the said contract entitles them.

The joint stock company, known as "The Texas Association," which was formed under said contract between the republic of Texas and the said Mercer, had authority, under the terms of said contract, to name one or more trustees to act for said association, and said association did appoint the

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said Mercer sole trustee, with full authority and power to bind the association, and act for it in the premises.

Mercer accepted the said trust, and continued to discharge the duties of trustee until the year 1852, when he sold and assigned his interest in the property of the association to said George Hancock, who was thereupon duly appointed and chosen trustee and chief agent of the association, in the place of Mercer, and invested with all the powers of such trustee and agent, and said Hancock continued to act as such trustee and agent up to the filing of the bill in this case, and afterwards to the time of his death.

The said George Hancock, soon after the sale to him by Mercer of his interest in said contract, came to the state of Texas, and found the rights of other colonial contractors under discussion in the legislature, and in litigation in the courts. He was advised that there would be an equitable adjustment of all colonial contracts, including that of Mercer, and was, for that reason, requested by his associates to await the action of the state and confide in its justice. He did so, and urged the claims of himself and associates under said contract upon the officers of the state. He was thus delayed till 1858, when the Supreme Court decided in favor of the constitutionality and validity of said contract between the republic of Texas and Mercer. Soon after, the war of rebellion broke out, which made it impossible for him, during its continuance, to assert his rights. Recently he has constantly petitioned the legislature of the state for redress, but has never received any relief.

After the appointment of said Walsh as commissioner of the general land office of Texas, the present complainant gave him notice in writing of the rights of the Texas association and of complainant, and requested him not to issue any land certificates or patents for lands within the limits of the Mercer colony. Said Walsh refuses to comply with such request, and threatens to continue, and has continued, and still continues, to issue certificates and patents for lands within the Mercer colony to persons not claiming under or in privity with the contract of Mercer. At the same time the

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present complainant demanded of defendant Walsh, commissioner of the general land office, that he should issue to complainant, as chief agent of the Texas association, certificates for 1,376 sections of land, according to the terms of said contract, but Walsh refused, and still refuses, to comply with such demand, and refuses to deliver to complainant any land certificates whatever.

No land certificates, or patents for land, have ever been issued either to Mercer, Hancock, the Texas association or the complainant, for lands to which they were entitled under said contract. George Hancock, the successor as trustee and chief agent of the Texas association of the said Charles Fenton Mercer, by his last will and testament, appointed the present complainant, William Preston, to act as trustee and chief agent of the Texas association, maintain and prosecute its claims under said contract, or any suit based thereon, to revive the same, and to do all things which the said Hancock, under the said agreement of association and contract, might do, and did devise or bequeath to said William Preston all his right, title and interest in and to the estate, stock and property of said association. Complainant accepted said trust, and he is now chief agent and trustee of the Texas association, and has been and is recognized as such by the association and the members thereof.

In the convention which assembled July 4, 1845, to frame a constitution for the state of Texas, preparatory to her admission as one of the United States of America, attempts were made to declare colonial grants and contracts, including the Mercer contract, to be null and void *ab initio*. All such propositions were defeated, and no clause making such declaration was inserted in the constitution, but an ordinance adopted by the convention declared that the legislature should provide for proceedings in the courts by the attorney-general or district attorneys to test the constitutionality, legality and good faith of all colonization contracts, including Mercer's, entered into by the republic of Texas, and to decide whether the conditions of said contracts had been performed by the contractors.

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The legislature of Texas has never made any such provision of law as contemplated by the ordinance of 1845, although Mercer and Hancock, and the Texas association, have made repeated applications for the passage of such an act, whereby they could assert and vindicate their rights in the courts.

All colonial contracts made by President Houston for the republic of Texas, except the contract with Mercer, have been adjudicated and settled by the state of Texas, either by agreement of the contractors with the state, or by judicial proceedings authorized by special legislation for the particular case.

The joint resolutions of the congress of the United States, providing for the admission of Texas as one of the states of the Union, declared that the state of Texas should retain all the unappropriated lands within her borders, to be applied to the payment of the debts and liabilities of the republic of Texas, and the convention of 1845, which framed a constitution for the state of Texas, recognized and, in effect, admitted that the contract of Mercer was one of the liabilities of the republic.

On February 3, 1845, the republic of Texas, by legislative act, required Mercer and his associates to have the lines of their colony actually surveyed and marked by the first day of April, 1845, and, notwithstanding the great difficulty and expense of making such survey within so short a time, the same was accomplished and marked before the time limited by the act of congress.

Neither Mercer nor his associates, nor Hancock, nor the present complainant, have ever abandoned or failed to assert their rights under said contract, but have continually set up the same openly and publicly, and, in all ways open to them, have asserted the validity of said contract, and the full performance of its conditions by said Mercer and his associates.

Such were, in substance, the averments of the original and supplemental bills.

The original bill prayed for an injunction restraining the defendant and his successors, in the office of commissioner of

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the general land office of Texas, from allowing any location or survey of lands lying within the limits of the Mercer colony not yet patented, and from issuing any patent or grant of land within said limits, except to the complainant or the Texas association, and from doing, or suffering to be done, any act whereby such lands might be located, surveyed or patented to any other person or persons except complainant, to be held by him in trust for the Texas association. The bill also prayed general relief.

To the original and supplemental bills demurrers were filed on the following grounds :

1. Because the suit is in effect a suit against the state of Texas, and seeks to deprive the state of the right and power of disposing, in her own way, of her own public lands.

2. That if complainant is entitled to any relief, it must be sought through the political department of the government of the state of Texas.

3. That the case made by the bills does not entitle complainant to the relief prayed.

4. That the claim is barred by lapse of time.

5. That defendant is an executive officer of the state of Texas, whose duties are prescribed by law, and that the bill does not show that he has violated or refused to obey the law.

6. The bill is not sworn to.

7. This court is without power to restrain or enjoin defendant, he being an executive officer of a sovereign state.

8. That the acts of defendant complained of in the bill involve the exercise of official discretion, and are not merely ministerial acts, and he cannot therefore be enjoined.

9. The bill shows that defendant cannot refrain from patenting the lands mentioned, without violating an official duty.

10. The bill shows that no injury can come to the complainant pending the suit.

At the hearing of the demurrer, counsel for complainant moved for an injunction *pendente lite*, according to the prayer of the bill. The demurrer and motion were argued at the same time.

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Messrs. William Preston, John Mason Brown, John Hancock, C. S. West and W. F. North, for complainant.

Mr. George McCormick, Attorney-General of Texas, for defendant.

Woods, Circuit Judge. This is not a suit against the state of Texas. In the case of *Osborn v. The Bank of the United States*, 9 Wheat., 738, it was held that "in deciding who are parties to the suit, the court will not look beyond the record; that making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest, and that a state can be made a party only by shaping the bill expressly with that view, as when individuals or corporations are intended to be put in that relation to the case."

The doctrine of this case was approved in the later case of *Davis v. Gray*, 16 Wall., 203. See also, *Dodger v. Woolsey*, 18 How., 331; *State Bank of Ohio v. Knoop*, 16 How., 369; *Debolt v. Ohio Life and Trust Company*, 16 How. 432; *Debolt v. The Mechanics and Traders' Bank*, 18 How. 380, and the *Jefferson Branch Bank v. Skelly*, 1 Black, 436.

This suit is brought, not against the state, but against an officer of the state, who, it is alleged, without the authority of any valid law of the state is, by an unwarranted assumption of power, so using his official position as to invade rights secured to complainant by the constitution and laws of the United States. This is the very case put by the Supreme Court of the United States in *Osborn v. The Bank of the United States*, *supra*, where it is decided that "a circuit court of the United States may enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States, when such execution will violate the rights of complainant. To the same effect are the cases of *Davis v. Gray*, *supra*, and *Board of Liquidation v. McComb*, 92 U. S., 531.

It appears from the bill that Mercer concluded with the republic of Texas, a contract of colonization, that he performed its conditions, that rights have accrued to him and his

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associates, that these rights have been ascertained and fixed as to quantity and character, that he and his associates have a vested interest in the lands described in the contract, and that the state of Texas now holds the nominal legal title only, and that the defendant is violating his official duty as land commissioner by issuing to strangers certificates of title to lands which are in fact the property of complainant and his associates.

Is it within the power of the state of Texas to disregard the contract made by Mercer with the republic of Texas? If it is not, then, if the commissioner of the general land office is invading the rights of Mercer or his successors under the contract, either with or without the apparent authority of the legislature, his acts should be restrained by this court.

The Supreme Court of Texas, in the case of *Molton v. Cobb*, 21 Texas, 539, has held that the contract of the republic of Texas with Mercer was a valid contract. The court, in that case, declares that the legislative recognitions of the contract must be deemed to have put the question of its validity at rest. It was, therefore binding upon the republic. It was a grant of lands upon a condition subsequent, which condition the bill avers has been performed. It created an obligation on the part of the republic to convey the legal title to the lands as soon as the conditions had been performed.

It was a liability of the republic, which held the title to lands which it had contracted to convey, and for which the consideration has been paid in full. It was as complete and binding a liability as a sovereignty could assume. And the debates in, and action of, the convention of 1845, convened to frame a constitution for the state of Texas, show that these colonial contracts, including Mercer's, were regarded as liabilities of the republic. (See debates of the convention of 1845, pp. 610, 614, 616, 618, 620, 623, 627, 628, 630, 633, 640, 644.)

Now, what is the relation of the state of Texas to this liability?

By the first of the joint resolutions passed by the congress

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of the United States for annexing Texas to the United States (5 Statutes at Large, 797), it was declared that "congress doth consent that the territory properly included within and rightly belonging to the republic of Texas may be erected into a new state, to be called the state of Texas, with a republican form of government, adopted by the people of said republic by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the states of this Union."

The second of said joint resolutions declared "that the foregoing assent of congress is given upon the following conditions, to wit: * * * Second, said state, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, * * * and all other means pertaining to the public defense belonging to the republic of Texas, shall retain all the public funds, debts, etc., * * * and all the vacant and unappropriated lands lying within its limits to be applied to the payment of the debts and liabilities of the republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as the state may direct, but in no event are said debts and liabilities to become a charge upon the government of the United States."

These resolutions, on July 4, 1845, were accepted by an ordinance which passed the convention with but one dissenting vote, which was signed by every member of the convention, and which, after reciting the resolutions, declared, "that in order to manifest the assent of the people of this republic, as required in the above recited portions of said resolutions, we, the deputies of the people of Texas, in convention assembled, in their name and by their authority, do ordain and declare that we assent to and accept the proposed conditions and guarantees contained in the first and second resolutions of the congress of the United States aforesaid." (Hartley's Digest, 44, 47.) On the faith of the acceptance of these resolutions, Texas was admitted as a state into the Union of states.

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Is it now within the power of Texas to refuse compliance with any of the conditions imposed by these resolutions?

It seems to me to be clear that it is not. The passage of the resolutions by the congress of the United States and their acceptance by the deputies of the people of Texas constituted either a treaty or a contract. It probably cannot be considered as a treaty, because it was not made by the president by and with the advice and consent of two-thirds of the senators present, as prescribed by section 20, article 2, of the constitution, unless the long acquiescence of all departments of the government gives it the force and effect of a treaty. Whether it be a treaty or a contract, it is alike within the the clause of the constitution of the United States which forbids a state from impairing the obligation of contracts: *Green v. Biddle*, 8 Wheat., 1. If it is to be considered a treaty, it is protected by the second clause of article 6 of the constitution of the United States, which declares, "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." If this is a treaty, the legislature of Texas can no more repeal or annul it than it can annul or repeal a clause in the constitution of the United States. If it is to be considered as a contract it is equally beyond the power of the legislature; for a state is as much forbidden by the constitution from passing laws to impair the obligation of contracts made by herself as by other parties. By no device that a state can resort to can she escape this constitutional prohibition. It is perfectly clear that she cannot authorize her agents to violate her own contracts by leaving it to their discretion whether they shall violate them or not.

All that the complainant asks in this case is that an officer of the state of Texas may be enjoined from invading his rights by a disregard of the compact made by the state of Texas on the faith of which she was admitted as a state of the Union.

The state of Texas has never repudiated the contract made

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with Mercer. On the contrary, it has been pronounced valid and binding by her Supreme Court, as we have seen in *Melton v. Cobb, supra*. The act of the legislature of Texas of February 2, 1850 (Hartley's Digest, 702), is the only act to which we have been referred that gives authority to any one to issue certificates to be located within the Mercer colony, and those were to be issued, not generally, but only to settlers in the colony who were entitled to lands under the Mercer contract, and not by the commissioner of the general land office, but by a special commissioner appointed by the governor, who was to hear proof and determine what colonists were entitled to the lands. This is a recognition, rather than a repudiation, of the contract.

There is no act of the legislature of Texas directly imposing upon the commissioner of the general land office the duty of issuing certificates for location within the Mercer colony, and if there were, it would be null and void.

Nor have we been referred to, or have we been able to find, any act which clothes the commissioner of the general land office with judicial or *quasi*-judicial functions in regard to the issue of certificates and patents. He is, in regard to these duties, a ministerial officer only.

The ground assumed by complainant, that, by reason of the facts stated in the bill, the state of Texas becomes a trustee for him and his associates, seems to be well taken.

A state may become a trustee: Perry on Trusts, section 41.

The contract between the republic of Texas and Mercer was a grant of lands to Mercer upon a condition subsequent, which, according to averments of the bill, was performed. The legal title remained in the republic, which thereby became a trustee for Mercer and his associates: 3 Washburn on Real Property, third edition, 525, *et seq.*

On the execution of the contract, Mercer took a vested estate, defeasible only on the non-performance of the condition.

This trust imposed upon the republic of Texas was not extinguished by the formation of the state of Texas and her annexation to the Union, but was imposed and fastened upon

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the state as the sovereign successor of the republic: *New Orleans v. United States*, 10 Peters, 662; *Smith v. United States*, 10 Peters, 326; *United States v. Arredondo*, 6 Peters, 691; *Pollard's Heirs v. Kibbe*, 14 Peters, 353.

The state of Texas therefore is in the same plight, as regards the rights of Mercer and his associates, as the republic was, and holds the relation to them of trustee to *cestui que trust*. We have already seen that the state of Texas, by her own express consent, given in the most solemn manner, agreed to hold the public domain of the republic and apply it to the extinguishment of the liabilities of the republic. She therefore became a trustee for the parties to whom the republic was liable, not only by operation of law, but also by her own express contract.

This is an express trust which is defined to be a trust created by instruments that point out, directly and expressly, the property, persons and purposes of the trust: Perry on Trusts, section 24. If the state were, therefore, a party to this suit, it would not be competent for her to set up lapse of time or any defense analogous to the statute of limitations to protect her from being called on to execute the trust. For, as between trustee and *cestui que trust*, in the case of an express trust, such as this, the statute of limitations has no application and no length of time is a bar: Perry on Trusts, section 836, and cases cited.

Much less can an officer of the state—who, according to the averments of the bill, is by his acts, done without warrant of any valid law of the state, invading the rights of the beneficiaries of a trust assumed by the state—plead the lapse of time against the enforcement of the trust.

But, even if the defendant were in a position to set up the defense of lapse of time against the relief prayed by the bill, I think the averments of the bill offer reasonable excuse for the delay in bringing the suit, and it is the law of this state that, when such excuse is offered, the court will not apply the limitation: *McKin v. Williams*, 48 Texas, 89.

It is objected that the bill is not sworn to. The want of

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verification of the bill is not ground of demurrer. If the bill is not sworn to, the court will not allow an injunction to go unless its averments are sustained by evidence. The laws of congress, of the republic and of the state of Texas, and the facts of public history, of all of which the court takes judicial notice, the exhibits to the bill and the affidavits on file, sufficiently establish its averments.

The foregoing discussion has covered all the grounds of demurrer, and, in the opinion of this court, none of the grounds are well taken.

This is not a suit against the state, and does not seek to deprive her of the power of disposing of her own lands in her own way, for the lands which the complainant seeks to appropriate are not the property of the state.

The relief sought by the bill may be properly granted by a court of the United States, and the complainant is not compelled to seek his rights through the political department of the state government, to which he and his predecessors have, according to the bill, repeatedly appealed in vain.

The acts of the defendant against which relief is prayed are purely ministerial acts. Any law which authorizes the defendant to disregard the contract of the state is null and void, and therefore is not binding in law. If the defendant violates the provisions of a contract protected by the constitution of the United States, it is immaterial whether he is doing it with or without the apparent sanction of a law of this state, and no claim that defendant is performing an official duty will avail him.

The averments of the bill make a case of the highest equity, which imperatively demands the interference of this court to prevent irreparable injury to complainant and his associates. The complainant seeks to enforce an express trust, which no lapse of time can render stale.

The case seems to run on all fours with the case of *Davis v. Gray*, 16 Wall., *supra*, which went up from this district, and in which the governor of the state and the commissioner of the general land office were enjoined from issuing patents for lands within the territory granted by the state of Texas

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to the Memphis & El Paso Railroad Company. The conclusion seems inevitable that the demurrer must be overruled and that the injunction should go as prayed in the bill. And it is so ordered.

AUSTIN, AUGUST TERM, 1879.

EX PARTE EMILE FRANCOIS.

A statute of the state of Texas, passed February 12, 1858, and unrepealed, prohibited a white person from marrying a negro, and for its violation inflicted a penalty upon the white person, but none on the negro. *Held* (1) that the law was still in force, and (2), that it was not in violation of the fourteenth amendment to the constitution of the United States.

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The relator, who was alleged to be of the white race, and a citizen of Texas, was indicted in the district court of Travis county, Texas, for having unlawfully intermarried with a colored female who was of the African race. He was tried, convicted and sentenced to the penitentiary for five years.

The act under which the indictment was framed was passed February 12, 1858, when slavery still existed in Texas, and this act constitutes article 386 of Penal Code of Texas: Pasch. Dig., art. 2016, and reads thus: "If any white person shall, within this state, knowingly marry a negro, or a person of mixed blood, descended from negro ancestry, to the third generation inclusive, though one ancestor of each generation may have been a white person, or having so married in or out of this state, shall continue within this state to cohabit with such negro, or such descendant of a negro, he or she shall be punished by confinement in the penitentiary not less than two or more than five years."

Before being sent to the penitentiary, the relator made application for a writ of *habeas corpus* to the United States

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district judge, on the ground that his conviction was in violation of the constitution of the United States. On a previous occasion, in *Ex parte Lou Brown*, Judge Duval held the act in question to be no longer in force by reason of the changes wrought by the amendments to the constitution of the United States, and discharged the relator.

After the decision of that case, the court of appeals of Texas, in *Frasher v. The State*, 3 Tex. Court App., 263, held the act under consideration to be still in force. The legislature of Texas, at its session in April, 1879, changed the above act so as to punish both parties for the commission of the offense named in it, and the law on that subject now reads as follows: "If any white person and negro shall knowingly intermarry with each other within this state, or having so intermarried in or out of the state, shall continue to live together as man and wife within this state, they shall be punished by confinement in the penitentiary for a term not less than two nor more than five years."

But the latter act above cited does not take effect until September, 1879.

Mr. C. T. Garland, for the relator.

Mr. D. G. Wooten, for the state.

DUVAL, District Judge. An application similar to the present one was made to me some two years ago, in behalf of one Lou Brown, a white woman who had married a negro man. In her case the writ was granted and the petitioner was discharged. On that occasion no argument was had. The case was submitted to the court upon the facts as they appeared from the petition and the return of the officer, and with what seemed to be a tacit understanding of counsel on each side, that the prisoner ought to be discharged. Such at least is my recollection of the case. My impression then was that the act of the Texas legislature of February 12, 1858, which made it a penitentiary offense for a white person to marry a negro, was obsolete and inoperative, as having been passed when the negro was a slave, and not regarded in law as a "citizen of the United States." And if not obsolete,

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that it was in contravention of the fourteenth amendment of the federal constitution, and of the civil rights bill, because it inflicted a penalty upon the white person alone.

At a subsequent period, the precise question came before the Texas court of appeals, in the case of *Frasher v. The State*, Tex. Ct. App., 263. That court held that the statute in question was still in force, and was not invalidated by the adoption of the constitutional amendments, or by the civil rights bill. The reasoning of the court in this case, and a more thorough consideration of the case, induce me to doubt the correctness of my first impressions when acting in the case of Lou Brown.

The subject of marriage is one exclusively under the control of each state. Each one may pass such laws as it deems proper regulating the institution. One may forbid marriage for some causes, which would be no impediment in another, and may prescribe different penalties for a violation of the same prohibition. If a state thought proper to do so, I am not satisfied that she would be prohibited by any express provision of the federal constitution, or of the civil rights bill, from passing a law forbidding a marriage, among white persons, between an uncle and his niece, or between a Christian and a Jew, and imposing a penalty for its violation upon the man alone. If it could do this, then it could certainly forbid the marriage between a white person and a negro, and affix a penalty for the act upon the former alone. If the Texas statute punished the negro in such case and not the white person, then it would be clearly opposed to the civil rights bill, which expressly provides that the negro shall only be subject to the like pains and penalties as the white race. But is the converse of this proposition to be held as true in all cases? Upon mature consideration, I doubt whether it is so.

That the law in question is unwise and unjust—that it is repugnant to the spirit of the constitution, and of the civil rights bill, both of which contemplate the equality of all persons before the law, and the equal protection of the law to all—I have no doubt. At the same time, I am not satis-

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fied that it violates the letter of either. Unless it did so, I would not feel justified in declaring it to be unconstitutional.

As respects intermarriage between the white and black races, it is very certain that such a connection would rarely occur but for the influence of the former over the latter—an influence resulting from the superior education and intelligence of the whites, and the subordinate position so long held by the colored race. For such unnatural marriages, the whites are mainly to blame, and this may furnish some excuse, if not a justification, for punishing them alone, as a means of prevention. The learned counsel of petitioner has referred me to a newspaper report of a decision lately made by the circuit court of the United States in San Francisco, as supporting this application for a writ of *habeas corpus*. It is the case of *Ho Ah How, a Chinaman, v. Matthew Numan*, sheriff of the city and county of San Francisco. Without attempting to analyze the facts of the case, it seems to me they are so wholly different from the present as to render the decision of the court therein wholly inapplicable.

As before stated, I regard the acts of the Texas legislature as being unjust in its discrimination against the white race, and as contrary to the spirit of the constitution; but inasmuch as it relates to a subject over which the state has complete and exclusive control, and because I doubt whether it can be properly held to be a violation of the letter of the constitution, or of any law made in pursuance thereof, the application for the writ of *habeas corpus* must be refused.

NOTE.—The opinion of Judge Duval in the case of Lou Brown, above referred to, was as follows:

“ So far as I have been able to discover, there has been no law passed by the state of Texas since the abolition of slavery prohibiting marriage between the white and black races. The only question, therefore, presented before me is, whether this act of 1858 is now in force and operative? My conclusion is, that it is not, for the following reasons, among others:

“ Because it was passed in the interest and for the protection of slavery before the institution had been abolished, and when the negro was not a citizen of the United States, and because it fixes a penalty upon the

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white persons alone. It is a prohibition based solely upon color, and, operating on the white race alone.

“To say that this statute is now in force would be, as it seems to me, to disregard the effect of the 14th and 15th amendments of the constitution, of the United States, and the first section of the civil rights bill. I think it infringes on both. It is unfair and unequal in its operation, because it would visit a heavy penalty on a white citizen and none whatever upon a colored citizen for doing a certain act.

“Marriage between the two races is wholly abhorrent to my sense of fitness and propriety, and I presume it would be no violation of the constitution and laws of the United States—inasmuch as marriage is but a civil contract to be regulated by the laws of the several states—were the state of Texas now to pass a law forbidding such marriages, under penalties extending to both races alike. But until this is done, I think the matter must be considered as one of taste merely, and left for its control to the potent influence of public opinion.”

SAN ANTONIO, NOVEMBER TERM, 1879.

LAWRENCE WATERBURY & Co. v. THE CITY OF LAREDO ET AL.

Where a contract between citizens of the same state—even though the contract is neither a promissory note, negotiable by the same merchant, nor a bill of exchange—has been assigned by one of the parties to the same to a citizen of another state, who has brought suit thereon in a court of the state of which the defendant is a citizen, the suit may be removed to the United States circuit court of the proper district by virtue of the act of March 3, 1875 (18 Stat., 470).

From the transcript of the record filed in this case, it appeared that the suit was brought in the district court of Webb county, Texas, on October 10, 1878. The cause of action arose out of certain contracts alleged to have been made by and between Edmund J. Davis and the city of Laredo, by virtue of which the latter, as was claimed, became indebted to the former. It further appeared that Davis was a citizen of the state of Texas, and that he had transferred and assigned to Waterbury & Co., citizens of the state of New York, all his rights and interests, legal and equitable, grow-

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ing out of said contracts. The defendants were all citizens of the state of Texas.

At the October term, 1879, of said district court (which was the first term at which the suit could be tried), the plaintiffs filed their petition, alleging that they were citizens of the state of New York, and praying a removal of the case into the proper circuit court of the United States. On their giving the necessary bond, the district court of Webb county ordered the removal of the case to this court, and the record of the proceedings of the state court was filed here on November 3, 1879.

The defendants thereupon moved the United States circuit court to remand the cause on the ground that this court had no jurisdiction over it, resulting from the fact that the plaintiffs were assignees of a chose in action from Davis, who, being a citizen of Texas, could not himself have brought this suit in the circuit court of the United States.

Mr. Jacob Waelder, for the motion.

Mr. Edmund J. Davis, contra.

DEVAL, District Judge. This case has been removed here under the provisions of the act of congress of March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes" (18 Stat., 470).

Section 1 of the act of 1875 provides, among other things, "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states," etc. The original cognizance, however, given by this section is subject to the following limitation: "Nor shall

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any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange."

By section 11 of the judiciary act of 1789 (1 Stat., 73), the exception was confined to "foreign bills of exchange."

That the indebtedness of the city of Laredo to Davis, growing out of the alleged contracts, is a *chose in action*, there is no doubt. It is equally clear that Davis himself, being a citizen of the state of Texas, could not have sued the defendants, citizens of the same state, in the circuit court of the United States, nor could the plaintiffs, as his assignees, have done so. In either case the original jurisdiction, or the power to take cognizance of such a suit, if commenced in the circuit court would have been wanting, under the limitation quoted above. But the question now is, whether, if the case has been removed into this court, as provided for and allowed by the act of March 3, 1875, the jurisdiction to hear and determine it does not attach?

The case *Bushnell v. Kennedy*, decided by the Supreme Court of the United States in 1869, 9 Wallace, 387, was one from which it appears that the cause of action was an indebtedness of Bushnell, a citizen of the state of Connecticut, to Mills & Frisby, who were citizens of Louisiana, and that it was a *chose in action*. Mills & Frisby assigned all their claim to Kennedy & Co., also citizens of Louisiana, who sued Bushnell in the third district court of New Orleans, by whom the case was removed into the circuit court of the United States for the district of Louisiana. The circuit court remanded the case to the state court, for want of jurisdiction. The Supreme Court of the United States held that this was an error—that while the circuit court would not have had original cognizance of the case, had the suit been commenced therein, by reason of the limitation contained in the eleventh section of the judiciary act of 1787, that still, as Bushnell had

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the right, under the twelfth section of the same act (he being the defendant and a citizen of Connecticut), to remove the case, this removal gave the circuit court jurisdiction.

The case of the *City of Lexington v. Butler*, 14 Wallace, 282, was one of removal from a state court, under the provisions of the act of congress of 1867. But it fully recognizes and sustains the principle established in the case of *Bushnell v. Kennedy, supra*. In fact, it directly refers to that case as removing all doubt upon the subject. Mr. Justice Clifford, in delivering the opinion of the court, says: "Suits may properly be removed from a state court, into the circuit court, in cases where the jurisdiction of the circuit court, if the suit had been originally commenced there, could not have been sustained, as the twelfth section of the judiciary act does not contain any such restriction as that in the eleventh section of the act defining the original jurisdiction of the circuit courts." So, in like manner, the second section of the act of 1875, *supra*, contains no such restriction as is found in the first section. It provides that "in any suit of a civil nature, at law or in equity, brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and in which there shall be a controversy between citizens of different states, either party may remove the same into the proper circuit court of the United States."

Judge Dillon, in a recent treatise on "Removal of causes from state to federal courts," says: "It should be borne in mind that, in cases removed from the state courts, the jurisdiction of the circuit court is dependent upon the act under which the suit is removed, and not upon the legislation which confers jurisdiction upon that court in cases originally brought therein; and therefore the restrictions on the jurisdiction in the eleventh section of the judiciary act have no application to cases removed under the twelfth section of that act." And so, I apprehend that the restrictions on the jurisdiction of the circuit court contained in the first section of the act of 1875, have no application to cases removed under the provisions of the second and third sections of the same act. See also,

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Barclay v. The Loan Commissioner, 1 Woods, 254; *Gaines v. Fuentes*, 92 U. S., 10.

It seems to me that, under the decisions cited, this court has jurisdiction to hear and determine the cause in question.

The motion to remand is refused.

SOUTHERN DISTRICT OF GEORGIA.

NOVEMBER TERM, 1876.

CHARLES E. TAYLOR V. BRIGHAM & KELLY ET AL.

1. Since the passage of the act of June 1, 1872 (17 Stat., 196), the federal courts will follow the decisions of the state Supreme Court on questions of pleading.
2. The part owners of a steamboat are liab'e for the torts of the master, who is also a part owner, done in the execution of the business in which the boat is engaged.

Heard on motion for new trial.

On February 4, 1856, the steamer Charles Hartridge, when passing up the Ocmulgee river, found a lot of cotton, the property of plaintiff, at Nest-Egg landing, which had been left there for transportation down the river to Savannah. The captain took the cotton aboard, with the purpose of carrying it to Savannah, and proceeded up the river on his trip. His object in not waiting until he came back to Nest-Egg landing from his trip up the river, and then taking the cotton aboard, was to forestall any other boat, and make sure of the freight. He gave no bill of lading at the time, and took the cotton without authority of the owner. While proceeding up the river, the boat was snagged and took fire. The boat and cargo, including 42 bales of the cotton of the plaintiff, were consumed.

The plaintiff sued in trover the owners of the boat, among whom was the captain, for the value of his cotton so lost.

The jury found for the plaintiff, and the defendants here moved for a new trial, which they base on two grounds.

First. Because the court erred in not awarding a nonsuit.

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on the motion of defendants, based on the ground that the suit should have been in case and not in trover; and,

Second. Because the court erred in charging the jury, that if Taylor, as captain of the boat, and one of its part owners, did, while in the prosecution of the business in which the boat was engaged, convert the cotton, all of the defendants, as part owners of the boat, are liable for his act.

Mr. Richard F. Lyon, for the motion.

Mr. W. B. Hill, *contra*.

WOODS, Circuit Judge. The first ground of the motion is not well taken. By express act of congress, the practice, pleadings and forms and modes of proceeding in civil causes other than equity and admiralty causes, in the circuit and district courts shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held (17 Stat., 196).

In a suit brought in trover by other parties against these same defendants to recover for cotton lost in the same disaster, and under precisely similar circumstances, the Supreme Court of Georgia held trover and not case was the proper form of action: *Phillips et al. v. Brigham, Kelly & Co. et al.*, 26 Ga., 617. In that case the court said, that if there was a conversion of the cotton, trover was the proper remedy, and that both the taking of the cotton without authority and the deviation from the ordinary route, constituted a conversion.

This decision, upon a question of pleading in the state courts, is under the act of congress just quoted, binding upon this court.

Second. Were the defendants, as part owners of the boat, all liable for the act of the captain in converting the cotton while in the prosecution of the business in which the boat was engaged?

The law treats the captain of a boat as in some sort a subrogated principal, or qualified owner of the ship, possessing

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authority in the nature of exercitorial power for the time being. And his liability, founded upon this consideration, extends not merely to his contracts, but to his own negligences, malfeasances and misfeasances, as well as to those of his officers and crew.

Hence it is that the master of a general or carrier-ship, as well as the owner, is treated as a common carrier: Story on Agency, secs. 314, 315.

All owners of a vessel are liable for the consequences of a wrongful act of a person employed by them, or of one part owner, so far as he is acting as the agent and representative of the others, if the tort be committed in obedience to positive direction, or while in the actual discharge of a duty committed to him, or as a part of a service committed to him, and this rule extends to all cases of mere negligence, however gross: Parsons on Partnership, 572.

The owners of a ship are liable for the misconduct of the master to third persons, and for the conduct of the master and crew in the execution of the business in which they are engaged: *Joy v. Allen*, 3 W. and M., 303; *Dias v. The Revenge*, 3 Wash., 262; *Ralston v. The State Rights*, Crabbe, 22; *Sunday v. Gordon*, Blatch. and H., 569; *McGuire v. The Golden Gate*, McAll., 104; *L'Invincible*, 1 Wheat., 237; *The Anna Maria*, 2 Wheat., 327.

The owners are even liable for the willful and malicious acts of the master, done in the course and scope of his employment: *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason, 6; *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass., 436; *Hazard v. Israel*, 1 Binn., 240; *Lyons v. Martin*, 8 Adol. & E., 512; *McManus v. Crickett*, 1 East, 106; *Jones v. Hart*, 2 Salk., 441; *Middleton v. Fowler*, 1 Salk., 282; *Quarman v. Burnett*, 6 Mees. & W., 499; *Bowcher v. Noidstrom*, 1 Taunt., 568.

The authorities cited fully sustain the charge of the court, which is complained of.

Neither of the grounds on which the motion for a new trial is asked is well taken. The motion must, therefore, be overruled.

Hussey v. The Saragossa.

GEORGE W. HUSSEY v. THE SARAGOSSA.

1. A shipper seeking to recover damages of a common carrier for an injury to the thing shipped, must show some injury which cannot be the result of its inherent nature or defects, or some carelessness or negligence on the part of the carrier likely to cause the injury, before the burden is cast on the carrier to show that he is not in fault.
2. So where a horse, in apparent good health and condition, was shipped on board a steamer, and was delivered at the end of the voyage in a sick and dying condition, but without any fractures, wounds, or any external or visible injury: *Held*, that some negligence or carelessness on the part of the carrier, which would account for the condition in which the horse was delivered, must be shown by the shipper before he could put the carrier in fault, and recover damages for injury to the horse.

ADMIRALTY APPEAL. On October 25, 1873, the libelant shipped on board the steamship Saragossa, at Baltimore, to be carried to Savannah, a gray gelding, a trotting horse, known as Nick King. The horse was delivered to the stevedore, on the wharf, and slung on board by means of the sling and rope and tackle usually employed for such purpose. The horse was delivered to the libelant at Savannah, on October 29, without any apparent external injury, and on the next day he died.

The libelant claims that the horse was sound and in good health and condition when he was delivered to the stevedore and officers of the Saragossa; that he was injured by the careless and negligent manner in which he was slung on board; that immediately after he was placed on board he showed signs of injury; that he grew worse from day to day, and when he was delivered to libelant, on the 29th, he was in a dying condition, and died the next day, and his death, as above stated, was in consequence of the injury received at the hands of the officers and crew of the Saragossa, in slinging him on board. The libelant claims that the horse was worth three thousand dollars, and asks a decree against the respondent for his value.

The claimants, the owners of the Saragossa, deny that the

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horse was sound and in good health when delivered to the ship, deny that he was slung on board in a careless or negligent manner, and deny that he died from any injury received when he was slung on board or during the voyage, and aver that he died from natural causes, for which the ship is in no manner responsible, and they deny that he was worth the sum of three thousand dollars.

Messrs. S. Yates Levy, A. P. Adams and S. B. Adams, for libellant.

Mr. C. N. West, for claimant.

Woods, Circuit Judge. It is claimed by proctor for libellant that the horse, having been delivered to the ship in apparent good health and condition, and the ship having delivered him to the libellant, on the termination of the voyage, in a dying condition, the burden of proof is upon the respondent to show that the illness and death of the horse did not result from the act or neglect of the respondent, but from causes beyond its control.

The rule of law is, that when the carrier fails to deliver goods, or when he delivers goods in a damaged condition, the *onus* is cast upon him to show that he is not in fault. In other words, loss or injury is sufficient proof of negligence or misconduct, or of the intervention of human agency, and when shown, the burden is on the carrier to exempt himself: *Angell on Carriers*, sec. 202; *Story on Bailments*, sec. 329; *Code of Georgia*, sec. 2066.

But the shipper must show an injury to the article shipped before the burden is cast upon the carrier to exonerate himself. Is an injury shown when the article shipped is a horse or other live stock, which is proved to have been delivered to the carrier in good health and condition, and to have been re-delivered to the shipper in a sick and debilitated condition, but without any fractures, wounds, abrasions, or other external or visible injury? I think not. As well might a passenger who embarks in good health claim to support an action for damages against the common carrier, by simply

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showing that when he disembarked at the end of his voyage he was in a sick and debilitated condition.

The liability of a common carrier of animals is not in all respects the same as that of a carrier of inanimate property. For instance, he is not an insurer against injuries arising from the nature and propensities of the animals and which diligent care could not prevent. He is not liable for injuries by disease contracted without his fault after the stock is delivered to him. On the same principle, proof of the decay of perishable fruit committed to a common carrier, would not of itself be sufficient to charge him: *Boyce v. Anderson*, 2 Peters, 150; *Clarke v. The Rochester & Syracuse Railroad Co.*, 14 N. Y., 570; *Smith v. The New Haven & Northampton Railroad Co.*, 12 Allen, 531; *Hall & Co., v. Renfro*, 3 Met. (Ky.), 51; Story on Bailments, sec. 492, *a*.

When the damage to the thing shipped is apparently the result of its inherent nature or inherent defects, the shipper must show something more than its damaged condition before the carrier can be called on to explain. He must show some injury to the thing shipped which can not be the result of its inherent nature or defects, before the burden is cast upon the carrier to show that he is not in fault.

But without applying this rule in this case, we are satisfied from the weight of evidence that the horse of libelant was not injured by the careless handling of the respondents, but that he died from natural causes, and that he would have died if he had never been put on board the *Saragossa*.

Libel dismissed.

APRIL TERM, 1877.

IN RE MILES BASS.

1. The homestead secured to the head of a family by the state law is excepted by section 14 of the bankrupt act (Revised Statutes, section 5045) from the operation of the conveyances made to the assignee, and is not subject to the jurisdiction of the bankrupt court, but must be pursued by those having claims against it in the proper state tribunals.

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2. The fact that the bankrupt has in a particular case waived his right to the exemption, or that the homestead was not ascertained and set out in severalty before the proceedings in bankruptcy were begun, does not change the rule.

This was a petition filed by the assignee in bankruptcy to review the decision of the bankrupt court denying an order asked for by the assignee, directing him to "sell sufficient of the property of the bankrupt, in which the homestead exemption had been waived, to satisfy the claim in favor of which the waiver had been made."

Mr. Allen Fort, for the assignee :

1. A waiver of the homestead exemption is valid and binding in Georgia, and the debt in favor of which the waiver is made may be enforced against the exempted property: *Buck v. Lester*, 55 Ga., 579; *Simmons v. Anderson*, 56 Ga., 53; *In re Solomon*, Am. Law Times, vol. 1, new series, 351.

2. The assignee is only bound to set apart such a homestead as was exempt by law in 1871. At that date a waiver of the homestead was binding on the debtor.

3. The district court has jurisdiction complete in all matters relating to the bankrupt estate, as well for the purpose of enforcing liens and equitable mortgages on the bankrupt's exemption property as for the distribution of whatever surplus there may be, as assets.

Mr. Simmons, for bankrupt :

1. A waiver in law, to be valid, must be made with the same solemnities as are necessary to create an estate in land. There was no such waiver in this case.

2. The court has no jurisdiction of the matter. *In re Hunt*, 5 B. R., 493; *In re Lambert*, 2 B. R., 426; *In re Poleman*, 9 B. R., 376.

BRADLEY, Circuit Justice. The only property possessed by the bankrupt in this case, beyond the articles exempted by the bankrupt act (amounting to five hundred dollars in value) was claimed by him as homestead property, under the

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constitution and laws of Georgia, and therefore exempt from the claims of ordinary creditors by the state law, and it is conceded that if this homestead claim is admissible, the property is covered by it. But only one creditor has proved under the bankruptcy, being a partnership firm, one of whom was appointed assignee. This debt is represented by several promissory notes of the bankrupt, each of which contains an agreement to waive and renounce the maker's right to homestead and exemption in his property as against that contract.

The assignee applied for an order to sell the property in question, notwithstanding the claim of the homestead right, and free and discharged therefrom. The district judge refused so to order on the ground taken by the district court, of this and other districts, that the homestead secured to a person by the state law is excepted by the fourteenth section of the bankrupt act (Rev. Stat., sec. 5045), from the operation of the conveyance made to the assignee, and is not subject to the jurisdiction of the bankrupt court, but must be pursued by those who have claims against it, in the proper state tribunals.

I think the position taken by the district judge is correct. Not only is all property exempted by state laws, as those laws stood in 1871, expressly excepted from the operation of the conveyance to the assignee, but it is added in the section referred to, as if *ex industria*, that "these exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee, and in no case shall the property hereby excepted pass to the assignee or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title."

In other words, it is made as clear as anything can be, that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made. But whether so or not, it is not for the bankrupt court to inquire. The exemption is created by the state law, and the assignee acquires no title to the

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exempt property. If the creditor has a claim against it he must prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not.

Nor does it make any difference that the homestead was not ascertained or set out in severalty until after the proceedings in bankruptcy were commenced, or until after the conveyance to the assignee was executed. Whenever properly claimed and designated, the exemption protects it, and the exception created by the bankrupt act relates back to the conveyance and limits its operation. Though not designated when the conveyance was executed, it was capable of being designated, and on the principle that *id certum est quod certum reddi potest*, it is as much entitled to the benefit of the exception as if it had been designated and set apart before the bankruptcy occurred.

And here it is proper to remark that the assignee in this case misconceived his duty and powers when he assumed to judge that the bankrupt was not entitled to a homestead. That is for the court to say, and not for him. It was his business to report to the court whether the property claimed as homestead was or was not within the limit of value which the laws of Georgia allow for that purpose. Unless the court has this information, it cannot determine whether the property claimed is fairly within the allowance for homestead or not, and whether it has jurisdiction over the property or not.

What equities might arise if there were several creditors, and some of them had a lien or claim against the homestead property, and the others not, it is not necessary to decide. Those who had no such claim might, perhaps, properly object to those having such a claim being allowed to come in for a dividend against the general assets, until they had first exhausted their remedy against the exempted property, on the principle of marshaling assets. This would depend on the question whether the equity of the general creditors is superior to that of the bankrupt and his family in reference to the right of homestead and exemption. In some cases at least the equities might perhaps be equal, in which case the

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court would not require the assets to be marshaled. But even where the right to marshaling existed the bankruptcy court could not assume jurisdiction of the exempted property and order it to be sold, but would require the favored creditor to pursue his remedy against such property in a forum that could lawfully reach it.

The decree of the district judge is affirmed with costs.

JOSEPH A. ROBERTS AND JOSEPH BRAMELL V. THE STEAMSHIP HUNTSVILLE.

1. A ship was libeled for salvage, and a decree for salvage rendered. The sureties for the claimants, the owners, were compelled to pay the salvage decree. *Held*, that they were not entitled to priority, for the sum so paid, over valid mortgages which antedated the salvage services.
2. When a ship is libeled and seized, and released on bond, the libelants cannot re-seize her. By her discharge she becomes free, and all anterior liens stand good against her as before her seizure.

ADMIRALTY APPEAL. The facts appear in the opinion of the court.

Mr. S. Yates Levy, for libelants.

Mr. William Garrard cited 2 Parsons on Ship. and Adm., 233, 234; *The Leathers*, Newberry, 432; *The Union*, 4 Blatch., 90, 93; *The White Squall*, 4 Blatch., 103; *The Larch*, 2 Curtis, 427.

BRADLEY, Circuit Justice. The steamship Huntsville, of New York, being disabled at sea, was brought into the port of Savannah and libeled for salvage.

Roberts and Bramell, at the request of her master, who intervened for the owners, became sureties for the costs and salvage, and the vessel was discharged. A decree for salvage was made, and the sureties were obliged to pay the amount. Meanwhile, the vessel being left in their charge as factors, whilst undergoing repairs, and they becoming alarmed

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for their indemnification, having learned that the owner was insolvent, and that the vessel was covered by mortgages, filed the libel in the present case, not only for advances made for necessities supplied, but for their indemnification as sureties in the original suit, praying to be subrogated to the rights of the salvors. The vessel was thereupon re-seized and sold, and the proceeds paid into the registry of the court. The mortgagees intervened and contested the right of Roberts and Bramell, to priority on these proceeds.

The question now to be decided is, whether Roberts and Bramell, the present libelants, as sureties, seeking subrogation to the rights of the salvors, are entitled to priority over the mortgage liens, which are conceded to be valid, and to antedate the salvage services.

I am clearly of opinion that they are not. The rights of sureties subrogated to those of the original libelants, are so clearly and fully expounded by Judge McCaleb, in the case of *Carroll v. The Steamboat T. P. Leathers*, Newberry's Reports, 432, that it is unnecessary to add anything to the judgment in that case.

The salvors themselves ceased to have any lien on the ship after she was claimed and released from their seizure on stipulation. Their claim then became a personal one against the owners and stipulators. It has been repeatedly held that, except where fraud has been practiced in procuring the vessel's release, the libelants cannot re-seize her. By her discharge she becomes free, and all anterior liens stand good against her, as before the seizure. So that if the present libelants were invested with every right of the salvors, they could not have recourse to the ship again for the cause of salvage, except as they would have recourse against any other property of the owner: *The Union*, 4 Blatch., 90; *The White Squall*, 4 Blatch., 103; and cases there cited by Mr. Justice Nelson, and cases referred to by Judge McCaleb in *Carroll v. The Leathers*. The case of *The J. A. Brown*, decided by Judge Lowell, in Massachusetts, at the March term, 1876 (not yet reported), does not seem to me to be at variance with this conclusion. There a mate of

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a vessel libeled her for wages; pending the libel a part owner paid the wages and filed a libel seeking to be subrogated to the mate's lien as against a mortgage, and the subrogation was allowed as to that portion of the wages for which the part owner was not personally liable. I do not understand that in this case the vessel was discharged. It still remained subject to the lien for wages when the libel for subrogation was filed. This decision was in entire harmony with the cases to which I have referred, and I see no reason why it is not good law.

The conclusion to which I come, therefore, is that the sureties, the libelants in the present case, can only have such relief as the salvors could have by execution on their decree, which would be postponed to existing liens on the vessel. They are entitled to all the interest of the owner of the ship and to nothing more. This postpones them to the mortgagees.

The fact that the present libelants relied on the ship, and had possession of her (if such was the case), makes no difference. The possession they had was only the possession of the owner, and may have been a protection as against him, but had no greater force or effect. She was subject to all the liens to which she would have been subject in the owner's hands.

The decree of the district court is affirmed, with costs, and decree will be entered accordingly.

IN RE JOSEPH FRIEND.

1. Where no property is claimed by a bankrupt under the specific exemptions of the bankrupt act, his claim for an allowance must stand upon the exemption granted by the laws of the state.
2. Under the law of Georgia which exempts personal property of the value of one thousand dollars in specie, the bankrupt is not entitled to money the proceeds of articles sold by the assignee.
3. In this case the bankrupt set apart and claimed certain specific goods as exempt. The assignee took no notice of the claim, but mixed the goods claimed with others and sold all indiscriminately, and after-

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wards allotted to the bankrupt out of the proceeds one thousand dollars. *Held*, that the assignee mistook the law. All the bankrupt was entitled to was the proceeds of the specific goods claimed and set apart by him.

This was a petition to review the decree of the bankrupt court on exceptions to the assignee's allowance of exemptions.

Mr. Clifford Anderson, for petitioner.

Mr. R. E. Lester, *contra*.

BRADLEY, Circuit Justice. On examination of this case, I am of opinion that the assignee erred in setting apart to the bankrupt one thousand dollars on a specie basis (or eleven hundred and twenty-five dollars currency) in money, which accrued from the sale of his goods.

As no property was claimed by the bankrupt under the specific exemptions of the bankrupt act, his claim for an allowance must stand upon the exemption granted by the laws of the state. This, as to personal property (which is the only kind of property here in question), is "personal property to the value of one thousand dollars in specie : " Const. Ga., art. vii. But the articles must be specifically claimed (Code, 2003); and if money is claimed, it is to be invested under the direction of the ordinary, in such articles as the applicant may desire—and in no case will the allowance of cash, without such investment, be a valid exemption: Code of Ga., sec. 2016 (a); *Smith v. Turnley*, 44 Ga., 243. It is probable that the bankrupt court would not feel bound to superintend such investment, but, without it, would allow an exemption of money on hand. But this was not on hand. The money set apart is the proceeds of sales made by the assignee. The bankrupt should have specifically claimed the articles he desired before their conversion, unless deprived of an opportunity of doing so.

In this case the bankrupt did specifically claim certain goods which he set apart and separated from his other goods. The assignee took no notice of this separation, but mixed the goods together and sold them indiscriminately. The assignee

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then allotted to the bankrupt, out of the proceeds of sale, one thousand dollars in cash on a specie basis, as before stated. In doing thus he mistook the law. The bankrupt was entitled to the specific goods set apart and claimed by himself, if they did not exceed in value the amount of one thousand dollars in specie, and to those goods alone. The assignee having sold the entire stock, the bankrupt is only entitled to the proceeds of the specific goods set apart by himself. He cannot claim any advantage from the fact that the assignee improperly mixed the goods together. That would be unjust to the creditors. They have as much right to complain of the mixture as the bankrupt has. The assignee was the common agent of both parties; or rather, he was the agent of the law, and neither party ought to be prejudiced or advantaged by his act.

I do not find any sufficient proof of fraud to deprive the bankrupt of his right to have property exempted under the law.

The decree of the district court, and the decision of the register affirmed thereby, are reversed, and the matter is referred back to the assignee to ascertain (as near as can be done) the actual proceeds of the property claimed and set apart by the bankrupt (not to exceed one thousand dollars in specie), and to pay the same to him, and amend his schedule accordingly. The costs of this petition for review to be paid out of the general assets of the bankrupt estate.

**THE TOWNSEND SAVINGS BANK OF NEW HAVEN ET AL. V.
CARL EPPING AND ISAAC M. AIKEN.**

1. A homestead exemption established by law cannot affect antecedent liens, and cannot be set up in derogation thereof.
2. An act of the legislature of Georgia gave to persons employed in any steam saw-mill, or who furnished it with saw logs or with anything necessary to carry on the work of the mill, a lien of the highest dignity for the wages of the employes, or for the saw logs and other necessities furnished. *Held*, that it was not within the power of the

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legislature to make such lien paramount to that of prior judgments and mortgages, or other older liens.

3. An act of the legislature of Georgia, passed in 1842, established the lien mentioned in head-note two, in favor of the employes of steam saw-mills, and those furnishing the mills with logs and other necessities. On December 16, 1857, an act was passed which repealed the law, so far as it related to all saw-mills upon the several mouths of the Altamaha river, and declared that the term, "mouths of the Altamaha river," should include all the mills within ten miles of Darien, in straight line. *Held*, that a mill which was not strictly on one of the mouths of the Altamaha, but was embraced within the net-work of channels extending along the coast and connecting with the main channel of the Altamaha, and was within ten miles of Darien, by a right line, was fully within the terms of the repealing act.
4. A sale made on the foreclosure of a lien for logs furnished a saw-mill, where there was a prior mortgage, conveyed only the equity of redemption, subject to the mortgage.
5. When one of two joint mortgagors conveyed absolutely to the other his equity of redemption: *Held*, that he was not a necessary party to a bill to foreclose. But his right to redeem, in case the mortgaged property did not satisfy the mortgage debt, would not be foreclosed by the decree.
6. Without being a party he would be bound, by an account taken, to ascertain the sum due on the mortgage, unless he could show collusion.
7. Courts of equity are always unwilling to turn a complainant out of court on an objection, for want of proper parties, made at the final hearing. If they deem it necessary that a new party be made, they will generally allow the cause to stand over for that purpose.
8. A mortgage lien was paramount to a claim for homestead in the mortgaged premises. *Held*, that the wife of the mortgagor was not a necessary party to a bill to foreclose. The right to homestead was to be considered in the light of a subsequent incumbrance.
9. The wife is only interested to see that the mortgage shall not absorb more than it ought, to the detriment of the homestead, and the husband, being primarily liable on the mortgage note, is the only necessary party to be present at the taking of the account. Such account will be binding on persons only collaterally liable, unless collusion is shown.

IN EQUITY. Heard upon pleadings and evidence for final decree. The facts are stated in the opinion of the court.

Mr. Thomas M. Norwood, for complainants.

Mr. W. S. Baxinger, for defendants.

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BRADLEY, Circuit Justice. The defendant Aiken, and one Goodrich, being in partnership and about to run a steam saw-mill on Herd Island, near the mouth of the river Altamaha, in September, 1866, borrowed of the bank corporation, complainant, the sum of fifteen thousand dollars, and, to secure the payment thereof, executed and delivered to the said bank their three promissory notes for five thousand dollars each, payable on demand, with interest half-yearly in advance, and a mortgage upon the whole tract comprised on Herd's Island, including the saw-mill thereon, with the engines, machinery, etc. The other complainants joined in the notes as sureties. The constitution of Georgia, adopted in 1868, secured to every head of a family a homestead of realty to the value of two thousand dollars, and personal property to the value of one thousand dollars, to be exempt from execution and sale. The legislature afterwards prescribed the mode of setting apart and securing such homestead and property to the sole use and benefit of the family of the party claiming the same. The legislature of Georgia also, in 1868, passed a law giving to employes employed in any steam saw-mill, and to any person furnishing any steam saw-mill with timber, saw logs or provisions, or with any thing necessary to carry on the work of said mill, a lien of the highest dignity upon said mill for any debts, dues, wages or demands against the owner for such service, timber or other necessities, and prescribed the method of executing said lien.

Goodrich having sold out his interest in the saw-mill and property to Aiken, the latter, in 1870, took the requisite proceedings for having set off, as homestead, a large part of Herd's Island (not including the saw-mill), but including for personal property, to be exempt from execution, portions of the machinery of the mill. Carl Epping, one of the defendants, in 1870 placed a lien on the mill for timber furnished thereto, and took out an execution to sell the same for a debt of about five thousand dollars. John Strickland placed another lien upon the mill for about one hundred and thirty dollars. Under the latter the mill was put up to sale, and sold to Epping for five thousand one hundred dollars—

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against the protest of the complainant corporation. Epping claims to hold the whole amount of his bid by virtue of his lien and that of Strickland's, as paramount claims to that of the complainant under its mortgage.

The complainants in the present suit seek a decree to foreclose the mortgage given to the bank complainant (which has never been paid), and to set aside as null and void the sale under the lien of Strickland, and to declare the said lien, as well as that of Epping, subordinate to the said mortgage, and for a sale of the property under and by virtue of the mortgage, free and clear of said liens; or, if this cannot be done, that the purchase money bid by Epping at the lien sale may be declared to belong to the complainant. The complainants also seek to be relieved against Aiken's claim to a homestead.

The decision of the Supreme Court of the United States, in the case of *Gunn v. Barry*, 15 Wall., 610, has disposed of the question relating to the claim of homestead. That court held that the homestead exemption secured by the constitution of Georgia, adopted in 1868, does not affect liens created prior to that time, and cannot be set up in derogation thereof; and, accordingly, in view of this decision, the counsel for the defendants very properly abandoned that defense.

It is difficult to perceive any difference in principle between the claim grounded on the lien law referred to and that grounded on the homestead law. The former, as well as the latter, if attempted to be carried out as against debts which became a lien on particular property before the passage of the law, would be obnoxious to the objection of impairing the validity of contracts. To give to a person furnishing timber to a saw-mill a lien for the price, paramount to that of prior judgments, mortgages and other prior liens on the mill, would simply amount to a subversion of those liens *pro tanto*, without adding any corresponding value to the property. Such a lien has not the merit of a mechanics' lien, which is usually given for materials furnished and work done to a building, and presumably increasing its value to the amount of the claim. Indeed, the defendant's counsel does not insist that any claim can be set up against the mortgage

by virtue of the lien given by the law of 1868. But he bases the lien upon which the defense rests upon a prior law passed in 1842 (Cobb's Dig., 428), amendatory of a steamboat lien law passed in 1841. By the second section of the law of 1842 it was declared that all the provisions of the steamboat lien law should apply to all steam saw-mills, at or near any of the water-courses in the state, in behalf of all and every person or persons who might be employed by the owner for services rendered, or for timber or pine wood, provisions or supplies delivered to any such saw-mill. If this law was in force in 1870, when the timber in this case was furnished by Epping and Strickland, the liens claimed were valid ones, unless liable to some of the other objections which have been urged against them.

But the complainant contends that the second section of the act of 1842 was not in force in 1870, but had been repealed in 1857, in respect of the territory in which the mortgaged premises are situated. (Laws of 1857, 225.) The repealing act referred to, which was passed December 16, 1857, enacts that the second section in question, so far as it relates to all the saw-mills upon the several mouths of the Altamaha river, be and is repealed; and that the term "mouths of the Altamaha river," includes all the mills within ten miles in a straight line of Darien. It is conceded that the saw-mill in question is within ten miles, in a straight line, of Darien; but the defendant's counsel insists that it is not on one of the mouths of the Altamaha river. The state map shows, however, that Herd's Island is embraced within the network of channels which extend along the coast at that point, and which connect directly with the main channel of the Altamaha. Indeed, the description of the island in the mortgage bounds it on the south and east by the Altamaha river. But the positive language of the act, defining what is intended by the expression, "mouths of the Altamaha river," is controlling; and I do not see how it is possible to evade its force. In my judgment, the act of 1857 did repeal the second section of the act of 1842, so far as relates to the territory embracing the premises in question, and that no law

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existed in 1866, when the mortgage was executed, giving any such lien upon the mill in question, as that claimed by the defendants; and as the subsequent act of 1868 can not be invoked to derogate from the validity of the mortgage, neither Epping nor Strickland had any lien which could affect it. Therefore the sale under Strickland's lien must be considered as made subject to the lien of the complainant's mortgage. That sale could only affect the rights of Aiken. Epping, the purchaser, holds the property as Aiken held it, and has only the equity of redemption.

The defendants, however, raise an objection to the bill for want of proper parties. They contend that Goodrich, one of the joint makers of the mortgage notes, is a necessary party. Proper parties are not always necessary parties. It is laid down by Mr. Justice Story, in his work on Equity Pleading, that neither prior nor subsequent incumbrancers are necessary, though they are proper parties in a bill to foreclose. If not made parties, they are not bound by the decree: Section 193, and note. And he says distinctly that where the mortgagor has conveyed his equity of redemption absolutely, the assignee only need be made a party to the bill: Section 197. Goodrich conveyed his equity of redemption in the mortgaged premises to Aiken, and the latter is made a party. If Goodrich has any interest at all in the controversy, it arises from the fact that he may be resorted to ultimately as one of the makers of the notes if the property mortgaged does not bring enough to pay them. This may possibly entitle him to redeem, if he has to pay anything. Not being made a party, this right will not be extinguished. But without being a party he will be bound by the account taken as the amount due, unless he can show collusion. See *Haines v. Beach*, 3 Johns. Ch., 459.

Courts of equity are always unwilling to turn a complainant out of court on the objection for want of parties, made at the final hearing. If they deem it essential that a person should be a party who has not been made such, they will generally allow the cause to stand over in order that he may

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be brought in. I do not consider that to be necessary in this case. The objection is overruled.

It is also objected that Mrs. Aiken, the wife of the defendant Aiken, should have been made a party, because the suit seeks to subvert the claim of homestead in the mortgaged premises. The mortgage, as we have seen, is paramount to the right of homestead. The latter is to be viewed in the light of a subsequent incumbrance only. The wife, like the joint maker of the note, is only interested that the mortgage shall not absorb more than the just amount due thereon shall require. As to the amount due, the husband, Aiken, being primarily liable therefor, is the only party necessary to be present at the taking of the account; and such account will be binding on persons only collaterally liable, unless collusion be shown. And as to the right of such persons to resort to the mortgaged premises and redeem the same in case they are called upon to bear any part of the debt, we have seen that it is not taken away if they are not made parties. The wife stands in this respect in the same attitude as the joint obligor. She is a proper party, but not a necessary one. The complainants omit her at their peril. Not being made a party, her right to redeem by paying the mortgage debt is not cut off. In this case, I see no reason for holding the cause over in order to make the wife a party. It is apparent from the evidence in the cause, that the property is insufficient to pay the debt, and as Aiken, the principal debtor, is insolvent, no good would be accomplished by bringing the wife into the litigation.

The objection that no demand of payment of the notes was made before filing the bill, is not sustained by the evidence; and, besides this, the bringing of suit is itself a sufficient demand, even in an action at law.

The view which I have taken of the case renders it unnecessary to consider various other questions which were discussed on the argument. A decree must be entered for the complainants, that the corporation complainant is entitled to have the mortgaged premises sold to raise and satisfy the amount due for principal and interest on the several promis-

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sory notes secured by the mortgage, and also the costs of suit, free and clear of the claim for homestead and of any exemption of property under the constitution of 1868, or laws made in pursuance thereof; and free and clear of any claim under the liens set up by the defendants for furnishing timber or otherwise, and of all and any sale or sales made by virtue of such liens or either of the same; and that it be referred to a master to ascertain and report the amount due the corporation complainant on said notes and mortgage; and that the defendants be foreclosed of all equity of redemption and claim in and to the mortgaged premises that may be sold to pay the said debt.

MARTHA M. GIRARDEY V. ANDREW M. MOORE ET AL.

1. Whenever the controversy in a suit is between citizens of different states, it is within the judicial power of the United States, though there are other persons in the case, citizens of the same state, with a person or persons on the opposite side to them.
2. Subject to a limitation as to the amount in controversy, the act of March 3, 1875, "to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," invests the federal courts with jurisdiction arising from diverse citizenship of litigant parties, co-extensive with the judicial power conferred upon the general government by the constitution.
3. Persons who are only nominally interested in the controversy cannot confer jurisdiction or take it away.
4. Under the act of March 3, 1875, mentioned in head-note 2, if some of the plaintiffs and some of the defendants to a suit are citizens of the same state, the removal of the cause must be sought by all the plaintiffs or all the defendants.
5. But if all the plaintiffs on the one hand, and all the defendants on the other, are citizens of different states, then any one or more of either may remove the cause.
6. Under the said act of March 3, 1875, the whole suit must be removed, or no removal can take place.
7. The said act of March 3, 1875, does not repeal that part of the act of July 27, 1866 (14 Stat., 306), which authorizes one defendant, if a citizen of another state, to separate his case from that of the other defendants, who are citizens of the state where the suit is brought, and to remove it to the federal court.

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Bill in equity removed to the United States circuit court from the Richmond superior court. Heard on motion to remand to the state court

Mr. W. W. Montgomery, for the motion.

Mr. W. H. Hull, contra.

BRADLEY, Circuit Justice. This cause was commenced in December, 1875, in the superior court of Richmond county, Georgia, and was removed by Moore, one of the defendants, so far as it concerned him, to this court, in October, 1876, he being a citizen of Pennsylvania, and the other parties all being citizens of Georgia.

Motion is now made to remand the cause, on the ground that it cannot be thus split into two causes under the existing state of the law. The nature of the case is as follows: The bill charges that certain property in Augusta, known as Lafayette Hall and the Opera House, on which Moore holds a mortgage for twenty-seven thousand dollars, is subject to a trust for the benefit of the complainant, Mrs. Girardey, and her children, paramount to the mortgage; that it was property which was purchased by the defendant, Isidor P. Girardey (her husband), with the proceeds of other property which he had conveyed upon said trust to the remaining defendant, Bessman, but the deed had not been recorded, and was lost; that after the purchase of Lafayette Hall and the Opera House, Girardey borrowed \$27,000 of Moore, and gave him the mortgage in question; and that Bessman, the trustee, acted as Moore's agent in making the loan, thus affecting him with notice of the trust. The bill charges Girardey with receiving the rents and profits, and Bessman with breach of trust, and prays an account there, and that Moore may be enjoined from selling the property under his mortgage (which he is seeking to do) until the trust has been established, and for general relief.

Moore, in his petition to have the cause removed as to him, states that the controversy in the suit is wholly between him and the complainants, and can be determined, as between them, without the presence of the other defendants as parties

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in the cause. His counsel contends that the removal was authorized by the act of July 27th, 1866 (14 Stat., 306), or if that is repealed, then by act of March 3d, 1875. The counsel of complainants insists that the act of 1866 is repealed by that of 1875, and that the latter does not authorize the removal of a cause in the manner in which this has been removed; and that neither act authorizes this cause to be split in this way.

In order to get at the state of the law on this subject, it will be necessary briefly to review the history of the legislation which has been adopted in relation to the removal of causes from the state to the federal courts, on the ground of the parties being citizens of different states. Without noticing other conditions as to amount, etc., the judiciary act of 1789, section 12, authorized a removal where the suit is by a citizen of the state where the suit is brought, and against a citizen of another state. If there were more than one plaintiff or defendant, the courts held that all of the plaintiffs must be citizens of the state where the suit is brought, and that all the defendants must be citizens of other states. The act of July 27, 1866 (14 Stat., 306), without making any change in the requirement as to the citizenship of the plaintiffs in the state where the suit is brought, authorized a removal of the suit so far as it relates to a defendant who is a citizen of another state, though there are other defendants citizens of the state in which the suit is brought, if, so far as it relates to the former, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause. Both of these acts give the right to remove the cause to the defendant alone. The act of March 2, 1867 (14 Stat., 558), gives the right of removal, when a suit is between a citizen of the state where the suit is brought, and a citizen of another state, to the latter, whether plaintiff or defendant, on his making affidavit that he has reason to believe that, from prejudice or local influence, he will not be able to obtain justice in the state court. This act, like the

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act of 1789, has been held to apply only to cases where all the parties on one side are citizens of the state where the suit is brought, and all the parties on the other side are citizens of another state, or other states. Lastly, the act of March 3, 1875 (18 Stat., 470), gives a right of removal to either party in every suit in which there is a controversy between citizens of different states; and where the controversy is wholly between citizens of different states, and can be fully determined as between them, it authorizes any one or more of the plaintiffs or defendants actually interested in such controversy to remove the suit. This act repeals all acts and parts of acts *in conflict* therewith.

The act of 1875 undoubtedly greatly enlarges the class of cases which may be removed from the state into the federal courts, and a more careful examination of it may be useful on this occasion. Before this, congress had never invested the federal courts with jurisdiction arising from diverse citizenship of litigant parties co-extensive with the judicial power conferred upon the general government. Subject to a limitation as to the amount in controversy, this was attempted to be done by that act. It declares, in section first, that the circuit courts of the United States shall have original cognizance (concurrent with the courts of the several states) of all suits of a civil nature at common law or in equity, in which there shall be a controversy between citizens of different states; and in the second section it gives to either party, in such a suit as we have seen, the right to remove the same from a state court (if originally commenced there) to the circuit court. And where the controversy is wholly between citizens of different states, and can be fully determined as between them, it authorizes any one or more of several plaintiffs, or of several defendants, thus to remove the suit. The true interpretation of this statute involves the true interpretation of the constitutional power. The jurisdiction given to the circuit court is as broad as the judicial power.

Now, as to the extent of the judicial power I never had a doubt. My view may not be the correct one, but it is that

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which I have ever entertained ; and, as yet, there has been no decision of the Supreme Court to the contrary, whatever *dicta* may have dropped from different judges ; and it is this, that whenever the controversy in a suit is between citizens of different states, it is within the judicial power of the United States, though there are other persons in the case citizens of the same state with a person or persons on the opposite side to them. The grant of judicial power is in the affirmative, it extends to controversies (and of course to all controversies) between citizens of different states. There is no negative ; no exception of any cases in which the same controversy has also citizens of the same state on the two sides thereof. If the controversy involved is a controversy between citizens of different states, it is within the term, and I think within the spirit of the power granted. The constitutional language cannot be satisfied without giving it this construction. To say that it only embraces those controversies in which all the parties on one side and all the parties on the other side are citizens of different states, is to interpolate a limitation in the constitution which is not found there.

Of course, persons who are only nominally interested in the controversy cannot confer jurisdiction and cannot take it away. This has been frequently decided under the former laws.

It is objected to this view that it would be attended with great inconvenience, by having the effect of giving jurisdiction to the federal courts in cases where only a single one of many plaintiffs or defendants happened to be a citizen of another state. But the contrary view would be attended with equal inconvenience, for cases would arise (as they have often arisen under the old law as construed by the courts) in which one of many plaintiffs or defendants happening to be a citizen of the same state with one of the parties on the opposite side has defeated the jurisdiction. Extreme cases of the sort would undoubtedly arise whichever view may be taken, but no intermediate view can be taken which will avoid them. The argument *ab inconvenienti* is worth nothing, for it neutralizes itself by equal weight on both sides.

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I do not regard the construction given to the old judiciary act as at all conclusive on this question. I refer to those decisions in which it was held that all the plaintiffs must be citizens of the state where the suit was brought, and all the defendants must be citizens of other states. They were made upon the peculiar language of that act and took their origin at a period when a strict construction of federal jurisdiction in judicial matters was in vogue. The circumstances which induced this tendency are familiar to every student of American history.

If I am right in my construction of the act of March 3, 1875, the right of removing a cause from the state court to the circuit court of the United States exists in all cases where there are substantial parties, citizens of different states, on opposite sides of the cause, although there are parties on opposite sides who are citizens of the same state.

But then arises the question: To whom is the right of removal given? The answer to this question, as derived from the second section, is that it is given to either party, that is, to the plaintiffs or the defendants, in either case acting collectively, and where the controversy is wholly between citizens of different states, and can be determined as between them, the right is given to any one or more of the plaintiffs or defendants actually interested in the controversy. In other words, if some of the plaintiffs and defendants are citizens of the same state, the removal must be sought by all the plaintiffs or by all the defendants. One of several plaintiffs or one of several defendants cannot in that case remove the cause. But if all the plaintiffs on the one hand, and all the defendants on the other, are citizens of different states, then it does not require all the plaintiffs nor all the defendants to remove the cause, but any one or more of either may do it. But in either case it is the suit that is removed, and not a part of the suit.

If my construction of the act of 1875 is correct, it is clear that the removal of the cause could not be had under that act unless Bessman and Isador P. Girardey are to be regarded as merely nominal parties, and the real controversy in the suit

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is wholly between the complainants and the defendant Moore, as stated by the latter in his petition for removal. It is not at all improbable that the principal object of the suit was to defeat Moore's mortgage; but the frame of the bill is conceived for the purpose of establishing the trust, and the postponement of the mortgage as a consequence thereof, and Bessman being the alleged trustee, and Isador P. Girardey being the owner of the property to be affected, it cannot be said that the controversy in the suit is wholly between the complainants and Moore. His controversy with the complainants may, it is true, be disposed of separately. But under the act of 1875, the whole suit must be removed, or no removal at all can take place. It becomes important, therefore, to determine whether the act of 1875 has repealed the act of 1866. If it has, the case is ended here. If it has not, then the removal may, perhaps, be supported by the latter act.

The act of 1875 does not profess to repeal any acts, or parts of acts, which are in conflict with it. Is that part of the act of 1866 which authorizes one defendant, if a citizen of another state, to separate his case from that of the other defendants who are citizens of the state where the suit is brought, and to remove it into the federal court, in conflict with anything in the act of 1875? Cannot both stand together? In a case like the present, the act of 1875, as I understand it, would authorize all the plaintiffs or all the defendants collectively to remove the whole suit. The act of 1866 authorizes a defendant, not being a citizen of Georgia, to remove the case as to him, if there can be a final determination of the controversy, so far as he is concerned, without the presence of the other defendants as parties in the cause. It seems to me that there is no conflict here, no reason why both acts should not stand. I conclude, therefore, that the act of 1866, so far as it authorizes a defendant to remove a cause as to him, is not repealed by the act of 1875.

And I see no reason why the controversy between the complainants and Moore cannot be finally determined without the presence of the other defendants. Had the complainants

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filed the bill against Moore alone, he could have demurred to it for want of parties. He had obtained an order to issue a *fi. fa.* for sale of the mortgaged premises, and had issued the writ, and the sheriff had advertised the property for sale. The bill, on the facts alleged, would well have lain against him alone to enjoin him from selling the property, and to establish the trust as against his mortgage. The other defendants would have been proper parties, but I think they would not have been necessary parties to the case.

If this view is correct, this controversy between him and the complainants may be determined without the presence of the other defendants as parties in the cause.

The motion to remand the cause is refused.

 STOUGHTON & PECK v. B. HILL.

1. A domicile once acquired is presumed to continue. But this presumption does not prevail when its effect would be to impose upon the party the character of an enemy to his government.
2. An agent, unless expressly authorized, cannot bind his principal by receiving in satisfaction of a note held by him for collection a greatly depreciated currency which is not a legal tender.
3. By a note of hand, made in Georgia, February 16, 1859, and due January 1, 1860, the payment of a certain number of dollars was promised. *Held*, that the word dollars, as used in the note, meant dollars in lawful money of the United States.

IN EQUITY. Heard upon pleadings and evidence for final decree. The facts are stated in the opinion of the court.

Messrs. A. W. Stone and A. Sloan, for complainants.

Mr. B. Hill, *pro. per.*

ERSKINE, District Judge. The bill alleges that the plaintiffs are the owners and holders of a promissory note, purchased by them in due course of trade, before it became due, and of which the following is a copy :

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“MACON, Ga., February 16, 1859.

“On the first of January, 1860, we promise to pay the Macon & Brunswick Railroad Company, or bearer, five hundred dollars. Value received.

(Signed)

“STUBBS & HILL.”

And that not being paid at maturity, they, on the 8th of January, 1860, placed it with Poe, Grier & Poe, attorneys-at-law, for collection; that this firm was subsequently dissolved, and the note remained with W. Poe for collection; that the defendant Hill, surviving partner of Stubbs & Hill, the makers, combined to defraud the plaintiffs, with one Daniells, receiver of the so-called confederate states—who had got the note from said Poe, as the property of alien enemies, for sequestration—and obtained possession of it without payment of the same, or any part thereof, which fact has just come to the knowledge of the plaintiffs; that it is still in his possession, unless he has lost or destroyed it, and they ask that he be decreed to pay it, according to its tenor and effect.

Hill answered the bill, and he and said Poe responded to certain interrogatories.

It may be here remarked that the allegation of fraud, charged against Hill, has not been established. On the contrary, the evidence shows that he got possession of the note in a business-like manner, and not otherwise. And if he received it from Poe—for there is no evidence that he received it from Daniells—under a mistake of his legal liability, it is his misfortune; nothing more.

Hill states that Stubbs, in signing the note in the name of the firm, went beyond the scope of his authority; that it was given for railroad stock, which soon became worthless, and that he never heard of the note until the latter part of 1859, nor that Poe had it for collection until 1862, when he promised to pay it, and did afterwards, on the 24th of December, 1863, pay it in confederate treasury notes and state of Georgia treasury notes, and then received it from the hands of Poe, the attorney, who claimed the right to collect it; and

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that when he paid it he understood that the plaintiffs lived in this state when they traded for it, and supposed that they resided here when he took it up.

And as to Daniells, the receiver's, connection with the note, Poe says Daniells compelled him to surrender it, as the property of alien enemies, for sequestration by the confederate court, and that subsequently, on receiving the confederate and Georgia treasury notes from Hill, he turned them over to Daniells, who then delivered him the note, and he handed it to Hill; but he does not recollect whether the note had been sequestered and confiscated or not. Hill says he attached the note to the plaintiffs' interrogatories, and has not seen it since.

Upon a careful perusal of the evidence, I do not think it sustains the position of the defendant, that the plaintiffs had their domicile or fixed residence in Georgia, on the 8th of January, 1860, when they placed the note with the attorneys for collection. But assuming that it was then their actual residence; still, notwithstanding such fact, no presumption arises as to these plaintiffs (though the contrary was urged), that they continued to dwell here, on the 24th of December, 1863, when Hill got possession of the note, or during any period of the civil war. It is true that the Supreme Court declares, in *Mitchell v. United States*, 21 Wall., 350, that "a domicile once acquired is presumed to continue until it is shown to have been changed." But it seems to me that it would be illogical, if not, indeed, a pernicious straining of the general doctrine of inhabitancy, to infer and determine that these plaintiffs continued to reside here after the war commenced—a conclusion which, in judgment of law, would impress them with a hostile character to the United States, whether they were adherent to the rebellion or not.

Again, suppose that they really were residents of this state when they gave the note to the attorneys for collection, and that from the commencement to the termination of the war they resided here or elsewhere within the limits of the confederate territory; and without conferring any authority upon the attorneys to take, or having any knowledge, until long after—

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wards, that they had taken payment for it in confederate states treasury notes, and state of Georgia treasury notes—currencies not in existence until two years subsequent to the date of the note, and when received at par for it, the relative value of the confederate states paper—never made a legal tender by their congress—was as twenty, and the state of Georgia paper—which state, at no time, passed any law to compel creditors to receive it, or any, in regard to it, that would otherwise impair the obligation of contracts—as fifteen to one of gold, it clearly seems to me that the acceptance of these currencies by the attorneys, under such a state of facts, would not discharge Hill from liability on his note.

Be that as it may, the testimony discloses that the note was made on the 16th of February, 1859, and matured on the first of January, 1860; and it is not questioned that the plaintiffs took it for value, and while under due. The term “dollars,” as employed in this instrument, means dollars of the lawful money of the United States; and as it was not only executed, but came to maturity before the civil strife began, no extraneous evidence will be permitted to give it a different signification.

No evidence has been adduced to show that the plaintiffs knew of the pretended payment of the note, or of its delivery to Hill, until immediately before the institution of this suit, therefore no negligence is imputable to them. Then it is useless to pursue this subject further than to quote the language of the Supreme Court, by Mr. Justice Field, in *Ward v. Smith*, 7 Wall., 447: “The power of a collecting agent, by the general law, is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is, by common consent, considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal, if anything else is received by his agent, is, that he shall inform the debtor that he refuses to sanction the unauthorized transaction, within a reasonable period after it is brought to his knowledge.”

There must be a decree for the plaintiffs, with interest at

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the rate of seven per cent per annum on the principal, from the first of January, 1860, to the 19th of April, 1861, when the interest shall cease, and commence again on the second of August, 1866, and run to the present time, with costs of suit. See *United States v. Muhlenbrink*, 1 Woods, 569.

JAMES E. CLARKE & Co. v. S. E. CLARKE ET AL.

Logs which were the property and in possession of persons engaged exclusively in exporting timber from the United States to foreign countries, which had been purchased from citizens of Georgia for the purpose of exportation, were in a port of Georgia and of the United States awaiting shipment, though not on shipboard, which had been inspected according to the laws of Georgia and were afterwards exported by the owners, were, while so awaiting shipment and still on land, "exports" within the meaning of section 1, article 10, of the constitution of the United States, and as such were protected from imposts or duties or any taxation by the state of Georgia by whatever name it might be called, except such as was absolutely necessary for the execution of the inspection laws of the state.

Heard on demurrer to the declaration.

The declaration averred in substance: That the plaintiffs were aliens and subjects of Great Britain and partners in business; that on the first day of April, 1875, at the city of Darien in the state of Georgia, the plaintiffs, as such partners, were merchants engaged exclusively in exporting timber from the port of Darien to Great Britain and to other foreign countries, and had in their possession in said city a large quantity of timber as exports which had been purchased and fully paid for to citizens of Georgia, and inspected according to the laws of the state of Georgia before the said April 1, 1875, and at the time was being shipped and awaiting shipment to Great Britain, and which, before the trespasses of the defendants complained of, was in fact exported. That the plaintiffs were required by defendant, S. E. Clarke, to return said timber for taxes, which they declined to do. That said Clarke, pretending to act as receiver of tax returns

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for the county of McIntosh, assessed said timber at a valuation of \$16,000, and assessed a state and county tax thereon of \$240.

That said Clarke, after said timber had been exported as aforesaid, placed the said assessment in the hands of the defendant Allen McDonald, who claimed to be collector of taxes for McIntosh county, and said McDonald, after demanding said tax of plaintiffs, which they refused to pay, issued an execution and delivered the same to the defendant Thomas B. Blount, sheriff, commanding him to enforce the payment of said tax out of the property of the plaintiffs. Thereupon Blount levied said execution on one hundred square logs, the property of plaintiffs, and sold and disposed of, at public sale, forty-four of said logs of timber, of the value of one thousand dollars, for which they bring suit.

To this declaration the defendants filed a general demurrer.

Messrs. Julian Hartridge and W. S. Chisholm, for plaintiffs.

Mr. Rufus E. Lester (who filed a brief of Mr. N. J. Hammond, lately attorney-general of Georgia), for defendants.

WOODS, Circuit Judge. The plaintiffs claim that the logs of timber mentioned in the declaration on which the said tax was levied, were exports, and therefore exempt from state taxation under section 10, article 1, of the constitution of the United States, which declares: "No state shall, without the consent of the congress, levy any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws."

Section 799 of the code of Georgia declares that "all real and personal estate, whether owned by individuals or corporations, resident or non-resident, are liable to taxation unless specially exempted," and section 798 of the same code exempts from taxation "all property specially exempted by the constitution of the United States."

The defendants claim, first, that the timber logs of the plaintiffs on which the tax was levied were not "exports" in the sense in which that word is used in the constitution of

the United States ; and, second, that the tax levied was neither an "impost" nor a "duty," and therefore the said tax was not prohibited by the constitution of the United States.

The logs on which the tax was levied were the property of, and were in possession of persons engaged exclusively in exporting timber to foreign countries, they were purchased from citizens of Georgia for the purpose of exportation, they were in a port of the United States awaiting shipment, they had been inspected according to the laws of the state, and the purpose of the owners to export the logs was, after the levy of the tax thereon, actually carried out and the logs were exported.

It is clear, and it seems to be conceded by defendants, that if the logs had actually been on shipboard when the tax was levied, they might have well been considered exports. Is the fact that they were still on land, though awaiting shipment, such a circumstance as deprives them of their character as exports? The reasoning of the court in the case of *Brown v. Maryland*, 12 Wheaton, 419, demonstrates that it is not. The court in construing section 10, article 1, of the constitution, says : "The limitation is, 'except what may be absolutely necessary for executing the inspection laws.' Now, the inspection laws, so far as they act on articles for exportation, are generally executed on land before the article is put on board the vessel ; so far as they act on importations, they are generally executed on articles which are landed. The tax or duty of inspection, then, is a tax which is frequently if not always paid for services performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition."

Mr. Madison, in defending the clause under consideration, in the convention of Virginia called to adopt the constitution, said : "Some states export the produce of other states ; Virginia exports the produce of North Carolina ; Pennsylvania those of New Jersey and Delaware, and Rhode Island those of Connecticut and Massachusetts. The states exporting

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wished to retain the power of laying duties on exports to enable them to pay expenses incurred. The states whose produce was exported by other states were extremely jealous, lest a contribution should be raised of them by the exporting states by laying heavy duties on their own commodities. If this clause be fully considered, it will be found to be more consistent with justice and equity than any other practicable mode."

These views show that, in the opinion of Mr. Madison, the commodities of the producing states were considered exports even before they reached the port of shipment.

It seems clear, then, from these authorities, that these logs were, when the tax was laid upon them, even though they were still on land, exports within the meaning of the constitution of the United States, and as such protected from imposts or duties by the state.

But the defendants claim that the tax upon the logs was a tax levied upon the general mass of property in the state, and does not therefore fall within the constitutional prohibition, being neither an "impost" nor a "duty."

This construction would defeat the purpose for which section 10, article 1, was adopted. It would put it in the power of the state, by changing the manner of levying the tax, and by giving it another name, to evade the prohibition of the constitution.

In the case of *Low v. Austin*, 13 Wall., 29, the Supreme Court of the United States, having the subject under consideration, said: "The Supreme Court of California appears from its opinion to have considered the present case as excepted from the rule laid down in *Brown v. Maryland*, because the tax levied is not directly upon imports as such, and consequently the goods imported are not subjected to any burden as a class, but are only included as a part of the whole property of its citizens, which is subjected equally to an *ad valorem* tax. But the obvious answer to this position is found in the fact which is in substance expressed in the citations, made from the opinions of Marshall and Taney, that the goods imported do not lose their character as imports and

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become incorporated into the mass of the property of the state until they have passed from the control of the importer or been broken up by him from their original cases. While retaining their character as imports a tax upon them in any shape is within the constitutional prohibition. The extent and character of the tax are mere matters of legislative discretion."

This authority is directly opposed to the claim of defendants under consideration.

These views dispose of the main questions in this case. In the case of *Brown v. Maryland*, 12 Wheat., *supra*, Mr. Chief Justice Marshall remarks: "The constitutional prohibition to levy a duty on imports may certainly come in conflict with their acknowledged power to tax persons and property within their territories. The power and the restriction on it, though quite distinguishable when they do not approach each other may yet, like the intervening colors between black and white approach so nearly as to perplex the understanding as colors perplex the vision in making a distinction between them, yet the distinction exists and must be marked as the cases arise. Till they do arise it might be premature to state every rule as being universal in its application."

Profiting by this caution, all I undertake to decide in this case is, that under the circumstances set out in the declaration, the logs of the plaintiff were exports and exempted from state taxation by the constitution of the United States.

As they are exempted by the federal constitution they were exempted from state taxation by express provision of the Code of Georgia. Code, sec. 798, par. 1. Act of 1875, sec. 9, p. 117:

The defendants, in enforcing the tax levied on plaintiffs' property, were acting without authority of law. The assessor and collector were clearly without jurisdiction to assess and collect the tax, and the execution issued to the sheriff is no protection to him. They are all trespassers alike, and this action is well brought against them: *Wise v. Withers*, 3 Cranch, 331.

Demurrer overruled.

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APRIL TERM, 1878.

WILLIAM E. JACKSON, JR., ADM., v. THE MUTUAL LIFE
INSURANCE COMPANY, OF NEW YORK.

1. Under section three of the act of March 3, 1875, for the removal of causes (18 Stat., 470), the failure of the party seeking the removal to file in the circuit court, on or before the first day of its session next after the filing of the petition for removal, a copy of the record from the state court, does not deprive the circuit court of jurisdiction of the case.
2. In such a case the circuit court has discretion to remand the cause or not, as to it shall seem most conducive to the ends of justice.
3. Under said act the petition for removal need not aver that the parties were citizens of different states at the time the suit was brought. If they are citizens of different states when the petition for removal is filed, it is sufficient.

Heard on motion to remand cause to state court.

Mr. Frank H. Miller, for the motion.

Mr. G. T. Barnes and *J. B. Cumming*, *contra*.

Woods, Circuit Judge. The action was commenced in the superior court of Richmond county, Georgia, on May 11, 1877, against the defendant, which was, as averred in the complaint, a citizen of the state of New York. On the 16th of October following, at the appearance term of the state court, and before the cause could be tried, the defendant company filed its petition in that court for the removal of the cause to the United States circuit court for the southern district of Georgia. This petition alleged the pendency of the suit, that the same was brought for the recovery of the principal sum of five thousand dollars, and that the said William E. Jackson, jr., administrator, was a citizen of the state of Georgia, and the petitioner, a corporation created by the laws of the state of New York, resident in said state of New York, and a citizen thereof.

On the same day a bond, conditioned according to the act of congress of March 3, 1875 (18 Stat., 470, sec. 3), with penalty

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fixed and sureties approved by the state court, was filed by the petitioner.

The term of the United States circuit court, for the southern district of Georgia, next after the filing of petition and bond for removal, began on Thursday, the 8th day of November.

A copy of the record of the cause in the state court was not filed in the United States circuit court until the 22d day of November following.

The plaintiff has filed a motion to remove the cause to the state court upon the following, among other grounds :

1. Because the copy of the record was not filed in the circuit court on or before the first day of its then next session after the filing of the petition and bond for removal ; and,

2. Because the petition for removal does not aver that the parties were citizens of different states at the time of the commencement of the action.

Of these grounds in their order :

The act of congress under which this removal appears to have been sought (18 Stat., 470, sec. 3), does not declare in terms that the copy of the record must be filed in the United States court on the first day of its next succeeding session. The law only declares that the petitioner shall give bond conditioned that he will file such copy by the time mentioned.

The filing of the record at the time prescribed does not seem to be a jurisdictional fact. If it were, the jurisdiction of the United States court might be defeated by the refusal of the clerk of the state court to present a copy of the record in time to be filed in the federal court. The act of March 3, 1875, provides for the case where the party is not able to file a copy of the record by the time prescribed, by reason of the refusal of the clerk of the state court to furnish a copy thereof, and declares that "the circuit court to which any cause shall be removable under this act, shall have power to issue the writ of *certiorari* to said state court, commanding said court to make return of the record in any such cause removed as aforesaid ;" and the act then proceeds to provide for the case when it shall be impossible for the parties

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removing the cause under this act, or complying with its provisions for the removal thereof, to obtain such copy of the record, by declaring that the court may order that the prosecutor in the action, etc., shall file a copy of the paper or proceeding by which suit was commenced, and that the other party shall plead thereto.

All this seems entirely inconsistent with the idea that unless the copy of the record is filed on the first day of the next succeeding term of the federal court, that court is without jurisdiction of the cause. The filing of the record on the precise day prescribed cannot therefore be a matter of jurisdiction, but the failure to file is one of damages to be recovered on the bond given for the removal; and although the circuit court may well remand for failure of the party seeking the removal to comply with his bond, yet if the delay has caused no prejudice, and the party wishes the case to go on in the circuit court, and complies with all the requisites for removal at a day subsequent, it is in the discretion of the court to grant him the indulgence.

In the case of *Hyde v. Phoenix Insurance Co.*, 2 Dillon, 525, on the failure of the party by whom the petition and bond were filed to deposit a copy of the record in the federal court on the first day of its next term, the court allowed the opposite party to file the record and docket the cause, declaring that it was at his option to go on in the circuit court or move to remand the cause. This implies that the circuit court had jurisdiction of the case.

I am, therefore, of opinion that the failure of the defendant in this case to file a copy of the record by the first day of the term, did not defeat the jurisdiction of the court, and as it is not suggested that the plaintiff has suffered any damage by the fact that the record was not filed until fourteen days after the beginning of the term, the first ground upon which the motion to remand is based is not well taken.

2. It is said that the petition for removal is fatally defective in not stating that the parties were citizens of different states at the time of the commencement of this action.

It has been held by some of the state courts, that the peti-

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tion for removal must aver that the parties were citizens of different states at the time the suit was commenced: *Pechner v. Phoenix Ins. Co.*, N. Y. Court of Appeals, and other cases cited in Dillon on Removal of Causes, page 23.

The Supreme Court of the United States, in the case of *Insurance Company v. Pechner*, 95 U. S., 183, has taken the same view. These decisions, however, were made under the act of 1789 (1 Stat., 79, sec. 12).

The decision of the Supreme Court seems to be based on the peculiar language of this section, "that if a suit be commenced in any state court, * * by a citizen of the state in which the suit is brought, against a citizen of another state," and the matter in dispute exceeds the aforesaid sum, or value of five hundred dollars, etc., the suit may be removed to the United States court.

It has been held by Mr. Justice Miller, that the act of 1867, for the removal of causes (14 Stat., 558) "does not, in terms, prescribe the time at which the citizenship of the moving party must be acquired. Nor is there anything from which to imply that a time was intended to be limited in that regard. Had congress intended to confine the privileges of the act to parties who were citizens of different states at the commencement of the suit, it would have been very easy so to have provided. It did not see fit to do so. On the other hand, in express terms, or at least by the strongest implication, it provided otherwise. The language is, where a suit is now pending, or may hereafter be brought, in any such court in which there is a controversy between a citizen, etc., which is as much as to say, whenever a controversy shall arise in a suit pending in a state court, the parties to which shall at any time be citizens of different states, the cause may be removed. No time at which the citizenship should be acquired is limited. So the inference is, that it may be acquired at any time:" *Johnson v. Monell*, 1 Wool., 390. See, also, *McGinnity v. White*, 3 Dillon, 350.

The language of the act of March 3, 1875, under which the removal was sought to be made, in this case, is almost identical with that of the act of 1867, above quoted by Mr.

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Justice Miller, "That any suit of a civil nature at law, or in equity, now pending or hereafter brought in any state court when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * and in which there shall be a controversy between citizens of different states, * * either party may remove such suit," etc.

The act of 1789 did not give to the United States courts all the jurisdiction, authorized by the constitution, either in causes originally commenced in, or cases removed to, these courts. The clear purpose of the act of 1875, is to extend the jurisdiction of the United States courts to the full limits warranted by the constitution. The language used in describing the causes that may be removed, is much broader than that used in the act of 1789. Under the act of 1875, wherever there is a controversy between citizens of different states, in any suit pending in a United States court, the cause may be removed. Under the act of 1789, the cause could not be removed unless the suit was *commenced* by a citizen of the state in which the suit was brought against a citizen of another state. The distinction in the language and meaning of the two acts is clear and palpable.

The view above expressed of this act of 1875, has been taken by the Supreme Court of Georgia in the case now under consideration: *Jackson v. The Mutual Insurance Co.*, 60 Ga., 423.

The authorities cited, and a comparison of the acts of 1789 and 1875, show that it is immaterial, under the latter act, whether or not the parties were citizens of different states at the time the suit was commenced, provided they are citizens of different states at the time of filing the petition for removal.

I am of opinion, therefore, that the second ground for remanding the cause is not well taken.

Several other reasons for remanding the cause are stated in the petition for removal. But as they have been often passed on already by the courts, we have not thought necessary to give them particular notice. We do not consider any of them well taken.

The motion to remand the cause must be overruled.

NOVEMBER TERM, 1878.

GEORGE A. CUNNINGHAM v. THE MACON & BRUNSWICK RAIL-
ROAD COMPANY ET AL.

1. The purpose of the provisions of the act of the legislature of Georgia, passed December 8, 1866, which established a statutory mortgage on all the property of the Macon & Brunswick railroad company, to secure the payment of the bonds of the company, indorsed by the governor, was to protect the state from loss on account of such indorsement, and their effect was not to make the state a trustee for the bondholders.
2. A bill in equity which seeks to take from the possession of a state, property possessed and claimed by it, and to subject it to the payment of bonds, which the bill alleges were indorsed by the state, but which indorsement the state denies, though nominally brought against the governor and other state officers, is in substance a suit against the state, and cannot be maintained in a court of the United States on the theory that the state has assumed the duties of a trustee for the holders of said bonds.

IN EQUITY. Heard on demurrer of Alfred H. Colquitt to the bill of complaint.

The bill was filed by George A. Cunningham, a citizen of Virginia, against the Macon & Brunswick railroad company, and "J. W. Renfroe, treasurer of the state of Georgia; Alfred H. Colquitt, governor of the state of Georgia," and against Edward A. Flewellyn, W. A. Loftin, and George S. Jones, who styled themselves "Directors of the Macon & Brunswick railroad company," John H. James, and others, all citizens of the state of Georgia.

The averments of the bill were substantially as follows:

- On December 3, 1866, the general assembly of Georgia passed an act authorizing the governor to indorse certain bonds of the Macon & Brunswick railroad company. This act (Laws of 1866, pages 127, 128) declared that the governor, was thereby authorized "to place the indorsement of the state" upon the bonds of the said railroad company to the amount of \$10,000 per mile for as many miles of said road

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as were then completed, and the like amount for every additional ten miles as the same might be completed and put in running order, on the following terms and conditions, to wit: "Before any such indorsement shall be made, that so much of the road as the said indorsement shall be applied for, is completed," etc., "and that said road is free from all liens or mortgages or other incumbrances which may in any manner endanger the security of the state, and upon the further condition and express understanding that any indorsement of said bonds, when thus made, shall not only vest the title to all property of every kind, which may be purchased with said bonds, in the state, until all the bonds so indorsed shall be paid, but the said indorsement shall be and is hereby understood to operate as a prior lien or mortgage on all the property of the company, to be enforced as hereinafter provided." The act then proceeded to declare that "in the event any bond or bonds indorsed by the state, as provided in the first section of this act, shall not be paid by said railroad company at maturity or when due, it shall be the duty of the governor, upon information of such default by any holder of said bond or bonds, to seize and take possession of all the property of said railroad company and apply the earnings of said road to the extinguishment of said bond or bonds or coupons, and sell the said road and its equipments and other property belonging to said company, in such manner and at such time as in his judgment may best subserve the interest of all concerned."

Subsequently the general assembly of the state passed a series of joint resolutions, which were approved December 4, 1866 (Laws of 1866, p. 220), which declared that said railroad company should not sell or dispose of the said bonds, to be indorsed by the governor at a discount greater than ten per cent; that the indorsement of the state upon the bonds should not exceed one million of dollars until an amount of capital equal to the additional indorsement should be *bona fide* subscribed and paid into said company, and that in order more fully to secure the payment of the said bonds, it should be the duty of the railroad company to set apart annually

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two per cent of the amount indorsed for as a sinking fund, which should be invested in state bonds and deposited with the governor, to be held in trust for said company, and which should be applied exclusively to the payment of the bonds of said company.

Under these provisions of law, the bill averred that the railroad company issued bonds to the amount of \$1,950,000, which were indorsed by the governor, and afterwards negotiated by the railroad company, and that said indorsement operated as a statutory mortgage upon all the property which said railroad company held at the time of the indorsement, to the holders of said bonds to secure the payment of the bonds held by them.

On October 27, 1870, the general assembly passed an amendment to the act above mentioned, authorizing the governor to indorse additional bonds of said company to the extent of \$3,000 per mile.

This amending act (Laws of Georgia, 1870, page 336) is entitled "An act to amend an act to extend the aid of the state to the completion of the Macon & Brunswick railroad and for other purposes," and declares "that the above recited act be so amended as to authorize the governor to place the indorsement of the state, to the extent of \$3,000 per mile, upon the bonds of said Macon & Brunswick railroad company, in addition to ten thousand dollars, as recited in the act of which this is amendatory."

After the passage of this last named act, and by its authority, the governor indorsed additional bonds of said company to the amount of \$3,000 per mile of said company's road, amounting in the aggregate to \$600,000, which were put in circulation by the company for a valuable consideration.

The complainant is the *bona fide* holder, for a valuable consideration, of nineteen of said second series bonds, of the denomination of \$1,000 each.

On July 1, 1873, and on November 1, 1873, the said railroad company failed to pay the coupons on both said series of bonds which fell due at those dates respectively, and has

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not at any time since paid said coupons, nor any coupons falling due at subsequent dates.

On July 2, 1873, the governor, by virtue of the provisions of the act of 1866, seized the railroad and all other property of said company, on account of the default in the payment of said interest coupons.

On March 6, 1875 (Laws of 1875, page 371), the general assembly passed a series of resolutions declaring the indorsement of the state upon said second series of bonds, amounting to \$600,000, to be unconstitutional, null and void, and re-affirming the validity of the indorsement of the governor on the first series of \$1,950,000, and authorizing the governor to sell the railroad, with its franchises, equipments, etc., upon such terms and for such price in money or first mortgage indorsed bonds (naming the series of \$1,950,000) of the Macon & Brunswick railroad, or of the bonds of the state, as in his judgment might be consistent with the interests of the state.

On the first Tuesday of June, 1875, the road and other property of said company was, by the orders of his excellency James M. Smith, who was then the governor of Georgia, sold, after due advertisement, and was by him purchased for the state for the sum of \$100,000, and was afterwards conveyed by deed of said governor to the state of Georgia.

The bill averred that the said sale was void, because (1), the governor excluded the bonds of the \$600,000 series from being used as cash in the purchase of the road at their face value; and (2), because the governor was not authorized to bid on said property for the state, and had no constitutional power to make the purchase; that if said sale was not void, it was voidable, because, on the facts, the state was a trustee of the mortgaged property for the benefit of the bondholders, and had no right to buy at her own sale as such trustee, without incurring the risk of having the sale set aside at the instance of any beneficiary under the trust, and the complainant, as such beneficiary, elected to set said sale aside.

The state of Georgia has voluntarily taken up all of the \$1,950,000 series of bonds for which she became liable by

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the indorsement, by issuing therefor her own bonds, dollar for dollar, and the defendant Renfroe, as treasurer of the state, is regularly paying the interest on the bonds so substituted as it falls due.

The state purchased at said sale certain property of the railroad company which was not covered by the said statutory mortgage, to secure the said series of bonds amounting to \$1,950,000, because said property was acquired by the railroad company with funds other than the proceeds of said bonds, but was covered by said mortgage so far as to secure the \$600,000 series of bonds having been bought subsequent to the indorsement of said last-named bonds.

The bonds indorsed by the governor, to the extent of \$3,000 per mile, under authority of the act of 1870, are entitled to the benefit of the statutory mortgage created by the act of 1866, after the payment of the bonds indorsed by authority of the latter act, and as these have been voluntarily paid by the state, the second series of \$600,000 now constitutes the first lien, and are entitled to have said mortgage foreclosed for their payment.

By a deed dated June 30, 1873, the Macon & Brunswick railroad company conveyed certain property to L. N. Whittle, Esq., and another, in trust, to sell the same, and out of its proceeds to pay certain fare tickets issued by the company; that said trust was never executed, but said fare tickets were paid out of the earnings of the railroad after it had been seized by the state, and part of said property, consisting of three bonds of \$1,000 each of said first series of the Macon & Brunswick railroad bonds, indorsed by the state, and four hundred and forty shares of stock of the Southern & Atlantic telegraph company were transferred to the defendant Renfroe, as treasurer of the state, and certain real estate in the city of Macon, also included in said trust-deed to Whittle, is held and claimed by the First National Bank of Macon. All of said property was seized by the governor and sold by him at the sale above mentioned.

The bill further stated that it was filed for the purpose of foreclosing said statutory mortgage to pay the said second

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series of indorsed bonds, upon the assumption that the mortgage to the governor of Georgia was to him as trustee for the bondholders, to secure the payment of the bonds indorsed by the state, and was not a mortgage of indemnity to the state to secure her harmless against liability incurred by said indorsement, but if the court should be of opinion that the statutory mortgage was one of indemnity to the state, and the sale of the railroad property and its purchase by the state were valid, then the bill insists that both series of indorsed bonds stand upon the same footing, and are entitled to be paid *pro rata* out of the proceeds of said sale, and that the sums paid by said Renfroe, as treasurer of state, in taking up the coupons of the state bonds, which have been exchanged for the \$1,950,000 indorsed railroad bonds, represent a portion of their proceeds, and should be paid *pro rata* on both series of indorsed bonds, and that when the legislature of Georgia appropriates any sum for the payment of the principal of the state bonds so exchanged, such sum should, in like manner, be divided *pro rata* among the holders of both series of indorsed bonds, and that the bonds so exchanged should themselves be treated as the proceeds of the sale of the railroad property, and divided *pro rata* among all the holders of both series of the indorsed bonds.

The bill further averred that the defendant John H. James, and many others unknown, were holders of said state bonds so exchanged as aforesaid.

The bill prayed for the appointment of a receiver for all the property covered by said statutory mortgage, and that said statutory mortgage might be foreclosed and the property embraced therein sold, and the proceeds applied to the payment of the \$600,000 series of bonds indorsed by the state, or if the court should be of opinion that said mortgage was a mortgage of indemnity, and said purchase of the railroad by the state valid, then, that any of said property not covered by said mortgage, might be required to be delivered by the holders to the receiver, to be apportioned, and that said Renfroe might be enjoined from paying any further coupons on the bonds of the state exchanged for the \$1,950,000

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series of indorsed railroad bonds, and that the holders of the exchanged bonds, when discovered, might be compelled to account to the complainant and other holders of bonds of said \$600,000 series for their *pro rata* of such exchanged bonds, and that said defendant James might be restrained from disposing of said exchanged bonds held by him.

To this bill, Alfred H. Colquitt, governor of the state of Georgia, filed his demurrer, claiming that the court could not take cognizance of the matters and things set up in said bill, as against him, because he had no personal interest in the suit, and the same was an attempt to reach the state of Georgia through him, as governor, and to make it a party to said proceedings, so as to bind it by the decree of the court, and praying that the bill be dismissed as to him.

Messrs. A. G. McGrath and W. W. Montgomery, for complainant.

Messrs. R. N. Ely, attorney-general of Georgia, and *R. F. Lyon*, for defendants.

WOODS, Circuit Judge. If, upon the facts of the bill, the statutory mortgage was intended as an indemnity to the state to secure it against its indorsement of the bonds of the railroad company, the question raised by the demurrer has already been considered and decided by this court adversely to the case made by the complainant. See *Branch v. The Macon & Brunswick Railroad Company*, 2 Woods, 385.

That such was the purpose of the act of December 3, 1866, is, in my judgment, clear. The constitution of the state of Georgia, in force at the time of the passage of this act, declared, "Nor shall the credit of the state be granted or loaned to aid any company, without a provision that the whole property of the company shall be bound for the security of the state, prior to any other debt or lien, except to laborers."

The act of December 3, 1866, and the resolutions of December 4, were unquestionably framed in view of this constitutional provision.

The act declares that before any indorsement of the rail-

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road bonds is made by the governor, he shall be satisfied that the road is free from all liens, etc., which may in any manner endanger the security of the state.

The state, through the legislature, provided this statutory mortgage to secure herself against her indorsement of the bonds of the railroad company. That was the prime and obvious intent of this legislation. Its purpose was not to put upon the state the duties of a trustee for the benefit of the holders of the bonds of the railroad company.

If this view is correct, the question raised by the demurrer is settled, so far as this court is concerned, by the case above mentioned.

To say that the state, under the facts, is a trustee for the bondholders, does not change the case; because every surety who holds property for his own indemnity, may be called upon by the creditor to apply the property to the payment of his debt. The surety, however, is still a surety, and holds the property primarily for his own protection.

But concede that the legislation above referred to makes the state a trustee for the holders of the railroad bonds indorsed by the state. Does that view relieve the bill from the objection raised by the demurrer?

The state denies, as appears by the bill, the validity of its indorsement upon the bonds held by complainant. She says it is without constitutional warrant, and null and void. If this is true, then the state has assumed none of the duties of a trustee for the holders of these bonds. She denies, in effect, that she is under any obligation as trustee, or otherwise, to these bondholders. The complainant seeks to hold the state to this indorsement, and having done that to compel her to appropriate to the payment of the indorsed bonds property which she claims as her own.

As remarked by Mr. Justice Bradley, in the case of *Branch v. The Macon & Brunswick Railroad Co.*, *supra*: "To sustain the complainant's case the court would be compelled to decide upon the state's liability on its indorsement of the second issue of bonds. * * * The court is asked to make a decree operating directly upon the rights of the

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state, and transferring them to the complainant and the other bondholders. It is not merely the possession of its agents, but the actual right and title of the state itself which are sought to be effected or transferred. We think this cannot be accomplished without making the state a party to the suit, and that cannot be done."

The entire property mentioned in the bill was seized by the state as covered by the statutory mortgage. It was sold, and bought for and conveyed to the state, and the state is in possession, asserting title to all but a small part of the property. The main purpose of the bill is to dispute the title of the state to the property possessed and claimed by her, and by the decree of this court to transfer the property to the holders of a series of bonds with whom the state claims she never entered into any valid obligation whatever. That is the case made by the bill, when stripped of the plausible theories with which the genius of counsel has clothed it.

The bill is, to all intents and purposes, a suit against the state. It is mainly her property, and not that of Alfred H. Colquitt, or J. W. Renfroe, that is to be affected by the decree of the court. It is the title of the state that is assailed. The attack is not made against the state directly, but through her officers. This indirect way of making the state a party is just as open to objection as if the state had been named as a defendant.

But there is a part of the property mentioned in the bill, and as against which relief is sought, to wit: Lots numbers one and seven, in block ten, southwest common, city of Macon, which is not now in possession of or claimed by the state of Georgia, but is held and claimed by the First National Bank of Macon, as purchaser from the state, which is made a defendant to the bill. In sustaining the demurrer of Alfred H. Colquitt, that part of the bill relating to the property claimed by the First National Bank of Macon is left untouched.

Demurrer of Alfred H. Colquitt sustained.

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**THE GIRARD FIRE & MARINE INSURANCE COMPANY v.
RICHARD D. GUERARD ET AL.**

1. A court of equity has no jurisdiction of a suit on a bond which, it is alleged, was, through the fraud of a person not a party to the suit, delivered up to be canceled, but which it was claimed was still in force, where no discovery was sought, and where the bill furnished a substantial copy of the bond.

IN EQUITY. Heard on demurrer to the bill.

The bill alleged in substance as follows: On July 6, 1875, the complainant, a fire and marine insurance company of the city of Philadelphia, appointed one Benjamin E. Guerard, of Savannah, Georgia, its agent for that place. Guerard accepted the appointment, and on the same day executed and delivered his bond to the complainant, in the penal sum of three thousand dollars, with the defendants Richard D. Guerard and H. F. Train, sureties, conditioned, among other things, for the faithful performance of his duty as agent of the complainant, according to its rules and instructions, and for the payment to complainant of all cash premiums due on policies issued on applications for insurance taken by him or under his direction, and delivery, without fraud or delay, of all moneys, papers, notes, or other property which should come into his hands or under his control as such agent, and which belonged to complainant.

Having given such bond, the said Benjamin E. Guerard entered on his duties as such agent.

On or about October 1, 1875, it became known to complainant that Richard D. Guerard, one of the said sureties on said bond, and one of the defendants to the bill, had become a copartner of said Benjamin E. Guerard, in the insurance agency business, at Savannah, which included the agency of complainant.

The interest of Richard D. Guerard in the business continued until about December 20, 1876, at which time both he and Benjamin E. Guerard represented to complainant that Richard D. Guerard had sold his interest in said busi-

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ness to said Benjamin E. Guerard, and was about embarking in other business enterprises in which it was required of him that he should be free from any possible embarrassment as a surety for others, that said Richard D., therefore, desired to be relieved from his suretyship on said bond, and that if the bond was delivered up, the said Benjamin E. would furnish to complainant a new bond of indemnity.

Benjamin E. Guerard had, since he became the agent of complainant, made from time to time reports showing the policies of insurance issued and the premiums received by him, and complainant having full confidence in the truth of his reports, it appeared, therefore, when said request to deliver up said bond was made, that the complainant had received from Benjamin E. Guerard all moneys due from him by reason of his agency, and that all the conditions of his bond, up to the 20th day of December, 1876, had been fully performed. Complainant, therefore, in compliance with the request of Benjamin E. and Richard E. Guerard, did, on the 8th of February, 1877, return by mail to Benjamin E. Guerard the said bond, the complainant having before that time received from him a new bond of indemnity, dated December 20, 1876.

On investigation, instituted after the return to Benjamin E. Guerard, of said bond of indemnity, it turned out to be the fact, that prior to the dissolution of said partnership, on December 20, 1876, Benjamin D. Guerard had, at various times, made false and fraudulent reports of the policies issued and premiums received by him; that upon the policies issued he reported premiums received by him only to the amount of forty-nine dollars and fifty-five cents, when, in fact, the amount received by him up to December 20, 1876, was twelve hundred and sixty-one dollars, and the amount fraudulently withheld by him, and not accounted for, was the difference between said amounts, to wit: the sum of twelve hundred and eleven dollars and forty-five cents. This last-named sum, with interest, still remains due and unpaid.

According to the rules of the complainant, well known to

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Benjamin E. Guerard, it was his duty to report monthly, the amounts received by him for premiums. This duty he failed to perform, and complainant had no knowledge or information of the falsity of the reports of Benjamin E. Guerard, or of his fraudulent conduct towards complainant, until after the first-mentioned bond of indemnity had been returned to him. Had complainant known or suspected the true state of facts, it would not have returned the bond to Benjamin E. Guerard, but was induced so to do by his fraudulent reports and representations. The return of the bond was obtained from complainant by means of the fraud and concealment of material facts practiced by Benjamin E. Guerard.

The condition of the bond of indemnity so returned had been broken, and all the obligors were liable thereon before its return to Benjamin E. Guerard.

Complainant has requested the return of said bond, but it has not been returned.

Discovery is waived, and the bill prays that the defendants Richard D. Guerard and H. F. Train might be decreed to return and deliver up said bond, if it is in their possession or control ; if it has been lost or destroyed, that the court would by decree establish it, and that defendants might be ordered and decreed, jointly and severally, to pay to complainant the said sum of \$1,211.45 and interest, and all losses, damages and expenses which complainant may have sustained by reason of the promises and the breaches of the condition of said bond aforesaid.

A substantial copy of the said bond of indemnity is, as the bill alleges, appended thereto as an exhibit.

The principal in the bond, Benjamin E. Guerard, was not made a defendant to the bill, but it was alleged that he had absconded, and, at the time of filing the bill, the complainant did not know his place of residence or sojourn.

The defendants demurred to the bill on the ground that this court, as a court of equity, had no jurisdiction of the case made by the bill, there being a plain, adequate and complete remedy at law.

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Mr. William Garrard, for complainant.

Messrs. John M. Guerard and J. R. Saussy, for defendants.

Woods, Circuit Judge. The bill cannot be sustained on the ground of discovery, for discovery is expressly waived, nor on the ground of account, for the complainant states with precision the amount he claims, and if anything is to be added by way of interest or expenses, that can be ascertained as well in a court of law as of equity.

Does the fact that the bond is not in the possession of complainant, but that its possession has been obtained by the fraud of one of the obligors, give a court of equity jurisdiction?

It does not, if, notwithstanding these facts, there still remains to complainant a plain, adequate and complete remedy at law.

These circumstances do not, either in stating the case by pleading, or in proving it by evidence, in a court at law, present any obstacle to a complete and adequate remedy.

When a party pleads a deed, or claims or justifies under it, he must, as a general rule, make profert of it. But there are exceptions to this rule, among which is the case where the deed is lost or destroyed, or is in the possession of the opposite party. These circumstances dispense with the necessity of profert: Stephen on Pleading, 439-441.

In proving the averments of the declaration, when the instrument sued on was lost or in possession of opposite party, there would be no obstacle in a court of law. Even where a written instrument which is required in evidence is in the possession of a third person, yet if there is a privity between such person and the party, a notice to the party is sufficient to let in evidence of its contents.

And in case the other party refuses to produce an original deed or agreement which is in his possession, and which he has had notice to produce, secondary evidence of the contents will be received without proof of the execution of the original: 1 Phillips on Evidence, 440, 452.

This is substantially the rule enacted by the Code of Geor-

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gia, without regard to the means by which the paper got into the possession of the opposite party. See Code, secs. 3508, 3509 and 3510.

So that if the complainant had brought an action at law on the bond, he would have found no difficulty incident to the limited powers of the court, either in stating his case upon the pleadings, or sustaining it upon the evidence.

But it is insisted by complainant's counsel that the bill avers fraudulent conduct and practices on the part of the principal of the bond in obtaining its return, and that these averments give a court of equity jurisdiction.

In answer to this, it is to be observed, first, that it is not the fraud of a party defendant to the bill which is complained of. There is no averment that either Richard D. Guerard or H. F. Train were guilty of any fraudulent practices in obtaining possession of the bond or otherwise. It is fraud practiced by a party defendant and not by third persons, which gives a court of equity jurisdiction: 1 Story's Eq. Jur., sec. 203.

It is not mere fraud which confers jurisdiction on a court of equity. A party may be guilty of fraud in the warranty of personal property sold, but nevertheless the remedy is at law on the warranty. So, if the maker of a bond by fraudulent artifice, or even theft, gets possession of the bond from the obligee, still if the obligee has a duplicate of the bond he cannot proceed in equity to recover upon the bond. A court of equity has jurisdiction to relieve from the consequences of fraud, as where a bond or note is procured, or deed of conveyance obtained, on false and fraudulent pretenses. So where a bond or deed is delivered up on fraudulent representations and is canceled or destroyed: *Cross v. Bedingfield*, 12 Simons, 35; *The East India Co. v. Donald*, 9 Vesey, Jr., 275.

But in this case there is no averment that the bond is lost, destroyed or canceled. The averment is simply that one of the parties to the bond, not a party to the suit, had, by false pretenses, obtained the possession of the bond, and the complainant, by his bill, furnishes what he avers to be a substantial copy. The bond is still in force, for the fraudu-

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lent acts of the principal in getting possession of it does not cancel it. Even deeds canceled by fraud and imposition are still in force: *United States v. Spaulding*, 2 Mason, 478, 482. The bond, from all that appears by the bill, is in existence, is still in full force and effect, and it can be pleaded and proven without difficulty or obstruction in a court of law. Under these circumstances it seems clear that the fraud of one not a party to the suit, in getting the possession of the bond from the obligee, does not authorize it to go into a court of equity for relief.

The rule to govern such cases is laid down with great precision and clearness by Mr. Justice Campbell in the case of *Hipp v. Babin*, 19 How., 271:

“The result of the argument is, that whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment, which affords a plain, adequate and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.”

The demurrer to the bill must be sustained.

APRIL TERM, 1879.

THE CITY OF SAVANNAH v. THE ATLANTIC & GULF RAILROAD COMPANY.

1. The act of the general assembly of Georgia of February 28, 1874, Laws of 1874, page 107, which requires railroad companies to return the value of their property to the comptroller-general, to be taxed as the property of other citizens, gives no authority to local or municipal bodies to tax the property of such companies.
2. The constitution of Georgia of 1877, which abolishes all laws exempting property from taxation, does not thereby impose any tax. Until the legislature authorizes a tax, none can be collected, and then only the particular tax authorized.

Heard on the petition of the mayor and common council of the city of Savannah, for allowance of taxes for the years 1877

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and 1878, in property of the Atlantic & Gulf Railroad Company in the city.

Mr. W. D. Harden, for the petitioners.

Mr. W. S. Chisholm, for the complainants.

Mr. Robt. Falligant, for the railroad company.

Messrs. H. R. Jackson, A. R. Lawton and W. S. Basinger, for the receivers.

BRADLEY, Circuit Justice. The claim in this case is based on two grounds:

1. That the act of 1874, subjecting the company to taxation as other citizens, has abolished the exemption granted by the company's charter, and has made its property taxable in all places.

2. That the constitution of 1877 has abolished all laws exempting property from taxation, except certain enumerated classes of property held for benevolent and public purposes, and, therefore, the property of the company is, at all events, liable to be taxed since 1877.

The first ground is clearly untenable. The act of 1874 did nothing more than declare that all railroad companies should annually return the value of their property to the comptroller-general to be taxed as other property of the people of the state, and that they should pay him the taxes assessed upon such property. This law clearly gives no authority to local and municipal bodies to tax the companies also. It might as well be said that because I authorize one man to pick cherries off my trees, therefore everybody has a right to do it. Taxation can only be imposed by law, and when the law prescribes how it is to be imposed, no one else has a right to exact it differently.

The second ground is no more tenable than the first. The constitution of 1877, it is true, says that "all laws exempting from taxation other than the property herein enumerated, shall be void." If this clause relates to past as well as future laws, still its only effect is to abolish exemptions and to leave the legislature free to tax all kinds of property. But until the

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legislature imposes a tax, no tax can be collected, and when it imposes only a particular tax, that alone can be collected.

Now, as we have seen, the legislature has imposed a particular tax, and none other, on railroad companies, and has made that tax payable to the comptroller, and not to the county or municipal authorities. The result is, that these authorities have acquired no right to tax the property of the companies. This seems to us very obvious, and requires no further discussion.

The application is denied.

THE STATE OF GEORGIA V. THE ATLANTIC & GULF RAILROAD COMPANY.

1. The lien of the state for taxes upon the property of a railroad company, rightfully in the custody of the law, is prior to all other liens whatsoever, except the lien of judicial costs.
2. Section 3669 of the Code of Georgia, provides that when an execution has been levied on property, and an affidavit of illegality filed to stay proceedings thereon, the property so levied on shall be subject to levy and sale under other executions: *Held*, that under this section, such property was subject to execution from the federal as well as the state courts.
3. The courts of the United States, within a state, have equal and concurrent power with the courts of the state, to render judgments and carry them into execution.
4. The equity of section 3669, Code of Georgia, applies to the taking into possession of property by a receiver, under the order of the court, as well as to a levy under execution.
5. The receiver holds the property as a sheriff would, subject to the prior lien which is being contested.
6. Where a levy on railroad property is suspended by an affidavit of illegality and bond, under the Code of Georgia, the federal court does not exceed its jurisdiction in taking possession of the same property by its receiver.
7. In Georgia a writ of *fiery facias* for taxes is subject to the same rules as to its mode of execution as writs issued on judgments in favor of private parties.
8. A railroad cannot be cut up into parcels and sold piecemeal on execution.

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This was an application made by counsel on behalf of the state of Georgia for leave to sell the depots, freight-houses, passenger-houses and offices of the railroad company, by virtue of a writ of *fieri facias*, which had been levied on said property to enforce the collection of taxes due the state.

The levy had been suspended by an affidavit of illegality filed by the railroad company.

Messrs. R. N. Ely, attorney-general of Georgia, and *Robert Toombs*, for the state, cited *Hagan v. Lucas*, 10 Pet., 400; *Wiswell v. Sampson*, 14 How., 52; *Hall v. Boyd*, 52 Ga., 456; *The City of Atlanta v. Grant*, 57 Ga., 340.

Messrs. W. S. Chisholm and *Robert Falligant*, *contra*, who contended that:

1. As soon as an affidavit of illegality was filed to the tax execution, the property on which those executions had been levied, immediately became subject as the property of the defendant, under section 3669 of the Code of Georgia, to the process of other courts.

2. The execution was levied on a small part of the defendant company's property, to wit, its depots, grounds, etc. No sale could be made under such a levy. Equity would enjoin such a sale, and as this court is now doing, take jurisdiction of the matter, and direct a sale of the entire property of the defendant company for the benefit of all concerned: *Macon & Western Railroad Co. v. Parker*, 9 Ga., 377; *The City of Atlanta v. Grant et al.*, 57 Ga., 340.

BRADLEY, Circuit Justice. In relation to the application made on behalf of the state for the collection of its taxes against the railroad company, we may remark, *in limine*, that the lien of the state for its taxes is undoubtedly prior to all other liens whatsoever, except judicial costs, which are first to be paid where the property is rightfully in the custody of the law.

We are of opinion, however, that the suspension of the tax executions by the contestation thereof, under an affidavit of illegality, left the property levied on open to be proceeded against by subsequent executions or other judicial process. This, we think, follows from a fair construction

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of section 3669 of the Code. This section declares as follows: "When an execution has been levied on property, and an affidavit of illegality filed to stay proceedings thereon, the property so levied on shall be subject to levy and sale under other execution, and the officer making the first levy shall claim, receive, hold and retain such amount of the proceeds of the sale as the court shall deem sufficient to pay the execution first levied, including interest up to the term of the court at which said illegality shall be determined; and any bond given by the defendant, on filing such affidavit, shall be released and discharged, so far as relates to the property sold."

We have no doubt that this release of the property in favor of a subsequent execution inures to the benefit of executions issued by the circuit court of the United States, sitting in Georgia, as well as to those issued by a state court. The circuit court is not a foreign court, though established by another jurisdiction. It is one of the courts which, under our complex form of government, is rightfully established for the administration of justice in the state of Georgia. The people of Georgia, and litigants therein, have state courts to resort to, and, in special cases, United States courts as well. They are their own courts in both cases—in the one case their own as citizens of the state; in the other case their own as citizens of the United States. The peculiar circumstances which give jurisdiction to the latter courts do not affect their entire equality and concurrence of power to render judgments or to carry them into execution. In this regard they have the same power and rights which the state courts have. The forms and modes of procedure used in the United States courts are precisely the same, in all cases at law, as those used in the state courts, and the proceedings in equity are not substantially different, though different in form.

We think, also, that the equity of the statute applies to a taking possession by a receiver under an order of court, as well as a levy under execution. The appointment of a receiver, in such a case as the present, is for the purpose of

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preserving the property, preparatory to a sale of it. The receiver holds it, as a sheriff would, subject to the prior lien of the execution which is being contested. That lien is not disturbed. The court will take care not only that it shall be respected, but will see that no injustice shall be done to the execution creditor by any unreasonable delay in satisfying his claim, either by a sale of the property, or in some other mode. Perhaps, if the property levied on could possibly be sold separately, so as not to injure other parties interested therein, it would order that the execution might be carried into effect by a sale of the property under the same; but if that would be destructive of the whole property as an entirety, it would require the same to be sold in a manner more conducive to the rights of all concerned, but still, according to the execution creditor, the effect of his prior lien.

In our judgment, therefore, this court did not exceed its jurisdiction in taking possession of the property through its receiver at a time when the levy under the execution was suspended.

But there is a difficulty in this case attending the tax levy made by the sheriff, which, if not obviated by some decision or course of decisions, of the Supreme Court of Georgia, seems to us to render that levy ineffectual and void. A *fi. fa.* for taxes is subject to the same rules as to the mode of its execution as other writs of *fi. fa.* are, which are issued on judgments in favor of private parties, and it seems to us that a portion of a railroad cannot be levied on and sold by virtue thereof.

A railroad is a public highway, and a highway of a most peculiar kind. It is not land, nor like land, in the ordinary sense. For, though in form, the railroad company may own the fee, or some other legal estate in the strip of land on which the road is constructed, yet the company owns it and holds it under a franchise for a particular purpose, namely, that of a road-way for the operation of a railroad under and by virtue of the franchises which have been conferred upon it, and for the purposes of travel and transportation thereon by the public. It is an artery of commerce; it is the means

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of communication between one part of the country and another. The interest which the public has in it is greater and more important than the interest which the company has in it. It cannot be supposed that the legislature, in authorizing its construction, and granting peculiar franchises for its operation and use, ever intended that execution creditors might levy upon parcels of it, and cut it up into sections, and destroy it as a great public thoroughfare. Such a supposition seems to us preposterous. Suppose a mile of the road should be levied on and sold, would the purchaser have a right to fence it in and take up the rails and cross-ties, and plant it, and thereby destroy the railroad? Could this be done without contemning the power of the state by which it was created and made a public highway?

We think not. There are other ways and means known to the law, or, at least, to equity, if not to the common law, by which creditors may compel the payment of their debts out of the property of the company—seizure of disconnected property belonging to the company, sequestration of earnings, or, if necessary, the sale of the entire road and its franchises. In one of these ways the rights of creditors can be protected, and the public would not be deprived of the means of communication which the erection and establishment of the line has created between different portions of the state, and between this state and other states of the Union. To sell it in parcels would be to sever an artery of commerce. It would affect the whole state in a vital part. Its public means of intercommunication are essential to the prosperity of the people. They are the most efficient appliances of modern civilization.

We cannot believe that the Supreme Court of Georgia, when the question is fairly presented to it, will ever sanction such a proceeding.

That court, in the case of *The Macon & Western Railroad Company v. Parker*, 9 Ga., 377, struck the key-note of the matter when it declared as follows, through Judge Lumpkin: "The facts of the case under consideration were

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novel and peculiar. Here was a road extending through six counties, and one hundred miles in length.

“What disastrous consequences would have resulted, if each judgment creditor had been allowed to seize and sell separate portions of the road, at different sales, in six different counties through which it passed, and to different purchasers. Would not this valuable property have been utterly sacrificed; the rights and interests of creditors, as well as the objects and intention of the legislature in granting this charter, entirely defeated?”

“I feel warranted in saying that the whole history of equity jurisprudence does not present a case which made the interference of its powers not only highly expedient, but so indispensably necessary in adjusting the rights of creditors to an insolvent's estate, as this did.”

The chancellor, then, in taking this matter in hand and directing a sale of the entire interest for the benefit of all concerned, was but invoking the powers of equity to aid the defects of the law; and so far from transcending his authority, he is entitled to the thanks of the parties and the country, for the correct and enlightened policy which he adopted.

The courts of law have now become so constituted, that every court may exercise equity powers, and no resort need be had to a separate court of equity to mould and frame the process and proceedings in such manner as to prevent injustice and wrong. The Code has authorized the superior courts to frame their judgments and executions in accordance with equity, and in the recent case of *The City of Atlanta v. Grant*, 57 Ga., 340, the following decision has been made:

1. “A chartered railroad, with all rights and privileges that properly appertain to it as an instrument of transportation (excluding, of course, the franchise of the corporation to be a body politic), is property, subject to be applied to the payment of its just debts, and the whole may be sold for that purpose, in this state, under a judgment at law.

2. “But the judgment, and the execution founded thereon, must be specially moulded in substantial compliance with sections 3082, 3562. 3639 of the code; if not in all cases,

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certainly in a case where the railroad, in pursuance of the charter, has been located and partially constructed in three counties.

3. A sale under an execution not thus moulded, about to be made by the sheriff, may be arrested by an affidavit of illegality interposed by the corporation through its proper officers.

4. "Such a sale, though consummated without legal resistance, would be void, and consequently the rights of other creditors, or of the stockholders, would not be lost."

Whether the executions in the present case have been moulded in such form as law and equity require, it is not proper for us to say. They command the sheriff generally, that of the goods and chattels, lands, tenements and franchises of the Atlantic & Gulf railroad company, they cause to be levied the amount of the taxes in question. This form may be sufficient to enable the sheriff to proceed according to law, but not contrary to law. Various goods, chattels and lands of the company might, perhaps, have been found on which a lawful levy might have been made. Perhaps the terms of the execution would have authorized the sheriff to levy on the road and franchises of the company as an entirety. But he has done none of these things. He has levied on a part, and a vital part of the road, without which its business cannot be carried on; namely, the depots and the freight-houses, and passenger houses and office. He has levied on the head, without which the railroad must become a lifeless trunk. We are clearly of opinion that this levy was void. Whether the railroad company has acquiesced, or has but faintly opposed this unlawful proceeding, we do not know. The bondholders and creditors who are represented in this cause, were not parties to the proceedings had in the Supreme Court, and are not bound thereby.

Under these circumstances, we have no hesitation in saying that this court had power, at least during the suspension of the illegal levy, to take possession of the property by means of its receiver.

But the lien of the state for taxes does not depend on any

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execution or levy. It is declared by the code, and is an independent lien, and this court will take care that the full right of the state shall be preserved so far as it shall be judicially brought to our notice.

The application for leave to proceed with the execution is denied.

MORRIS K. JESSUP, TRUSTEE, v. THE ATLANTIC & GULF RAILROAD COMPANY.**EUGENE KELLY ET AL., TRUSTEES, v. THE SAME.**

1. The laws of Georgia give no liens superior to a mortgage lien, except for taxes and to laborers and material men who take the proper steps to perfect their liens. *Held*, therefore, that in distributing the earnings of a mortgaged railroad, while the same were in the hands of a receiver, and the proceeds of its sale, the court would give priority only to those laborers and material men who had perfected their liens according to the state law.
2. Claims on a railroad company for through fares and freight, for which it may have been accountable, in part, to connecting lines, are nothing more than open accounts, which stand on the same footing as other unsecured debts.

Heard on petitions of various intervenors *pro interesse suo* to be paid their claims for services, materials, etc., performed and furnished before the appointment of receivers, out of the earnings of the road made since the receivers were appointed, or out of the proceeds of the road when sold.

Messrs. Geo. A. Mercer, Wm. Garrard, H. B. Tompkins, T. M. Norwood, H. C. Cunningham, R. R. Richards, J. R. Saussy, A. P. Adams, S. B. Adams, Collier & Charlton, and Kingsbury & Hammond, for petitioners.

Messrs. W. S. Chisholm and Robert Falligant, for the trustees.

Messrs. H. R. Jackson, A. R. Lawton and W. S. Basinger, for receivers.

BRADLEY, Circuit Justice. The trust-deeds in this case authorize the trustees, when default is made in the payment

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of interest on the bonds secured thereby, to enter upon and take possession of the mortgaged property, consisting of the railroad, built or to be built, with all its appurtenances and equipments, and machinery connected therewith, and to operate the same, and receive all tolls, income and profits thereof, for the benefit of the bondholders, after deducting all proper expenses; and, in due time, and after proper notice, to sell the road and property.

The laws of Georgia give no liens upon mortgaged property superior to the mortgage lien, except for the taxes due on the property and to laborers, mechanics and material men who take the proper steps to protect their liens. We think that we should follow the law and practice of the state in this respect. But in requiring the liens to be perfected, we do not mean that the parties should have taken any judicial steps in order to enforce their liens; but that they should have performed those preliminary requirements which entitle them to a judicial enforcement of the liens. If the statute requires the lien to be recorded, that should have been done in the time required by law. If it requires an oath to be taken verifying the lien, that should have been done within the time required. Having done this, then application to this court may stand in lieu of proceedings in the county courts or otherwise.

We think, also, that the claims for moneys received by the Atlantic & Gulf railroad company on through fares and freight, for which it may have been accountable, in part, to connecting lines, are nothing more than open accounts, which stand on the same footing as other unsecured debts of the company.

A general clause may be inserted in the decree declarative of the views which we have expressed, and the liquidation and ascertainment of the claims themselves which, according to our views, are entitled to a lien, may be reserved for further order upon the foot of the decree now to be made.

In drawing the decree the directions for a sale of the property should provide for payment into court of a sufficient sum to meet the liens that are prior to the mortgages, and to

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defray all expenses and charges of litigation. The counsel in the cause will be able to approximate the amount required for this purpose. If the amount specified should be insufficient, the deficiency would have to be made up by the purchasers of the road in case they are allowed to pay their bids in bonds of the company. The bonds can remain uncanceled until the matter is determined.

WALLACE S. JONES AND NOBLE W. JONES, EXECUTORS OF THE
LAST WILL OF GEORGE N. JONES ET AL., v. WILLIAM N.
HABERSHAM AND WILLIAM HUNTER, EXECUTORS OF THE
LAST WILL OF MARY TELFAIR, ET AL.

1. Where there is an immediate gift to trustees for a general charity, but the particular application of the fund will not of necessity take effect within any assignable limit of time, and can never take effect at all except on the occurrence of events in their nature contingent and uncertain, the gift is valid, and the court will hold up the fund a reasonable time to await the happening of the contingencies.
2. Certain devises and bequests in a will were made substantially in the following form : I hereby give, devise and bequeath to N. W. Jones all that lot (describing it), to him and his heirs forever. I hereby give, devise and bequeath to the trustees of the Independent Presbyterian Church, in Savannah, all that full lot of land (describing it and declaring the purposes for which the devise was made). The devises were followed by an item which declared : "It is my wish and I hereby direct that none of the legacies, bequests or devises in any of the clauses of this, my will, shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as the Hodgson Memorial Hall, which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate." *Held*, that the gifts themselves were not suspended, but only the payment thereof.
3. The law of charities is fully adopted in Georgia, as far as is compatible with a free government, where no royal prerogative is exercised.
4. There was devised by the will of the testator to the trustees of the Independent Presbyterian Church, in Savannah, a certain lot of land in that city, with the buildings thereon, upon terms and conditions stated as follows : *First*. That the trustees of the said Independent Church shall appropriate annually out of the rents and profits of said lot and improvements the sum of one thousand dollars to one or

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more Presbyterian or Congregational churches in the state of Georgia, in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the state. *Second.* This gift and devise is made on the further condition that neither the trustees nor any other officers of said Independent Presbyterian Church will have or authorize any material alteration or change made in the pulpit or galleries of the present church edifice on the corner of Bull and South Broad streets, but will permit the same to remain substantially as they are, subject only to proper repairs and improvements; nor shall they sell or alien the lot on which the Sabbath school-room of said church now stands, but shall hold the same to be improved in such manner as the trustees or pew-holders may direct. *Third.* Upon the further condition that the trustees of said Independent Presbyterian Church will keep in good order and have thoroughly cleaned up every spring and autumn my lot in the cemetery of Bonaventure, and that no interment or burial of any person shall ever take place either in the vault or within the inclosure of said lot; and for the purpose of having the same protected and cared for, I hereby give, devise and bequeath my said lot in the Bonaventure cemetery to the trustees of the Independent Presbyterian Church and their successors." *Held*, (a) that the devise was not void for uncertainty; (b) that the condition not to allow any alteration in the pulpit and galleries of the church, but to hold the same to be improved, and not to alien the sabbath school lot, did not render the bequest void; the condition for the improvement of the pulpit, etc., was a proper charity, and the others were conditions subsequent, which could not affect a charitable gift; (c) that the church named as trustee was capable of taking and executing the trust.

5. A will contained the following devise: "I give and devise to the Union Society of Savannah all that lot or parcel of land in the city of Savannah on the north side of Bay street, and at or near its intersection with Jefferson street, extended or prolonged, known in the plan of said city as lot letter 'B,' with the buildings and improvements thereon, but on the express condition that said society shall not sell or alienate said lot, but shall use and appropriate the rents and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society." *Held*, (a) that the condition expressed is a condition subsequent, which, if void, does not vitiate the gift; (b) that a condition against alienation annexed to property devoted to charity does not render it void; (c) that the fact that the Union Society had already a surplus of funds does not vitiate the gift.
6. A will contained the following devise: "*Twelfth.* I give, devise and bequeath to the Widows' Society of Savannah, all that lot or parcel

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of land in Savannah on the corner of President and West Broad streets, on which the improvements now consist of four brick tenement buildings, the rents and profits of the same to be appropriated to the benevolent purposes of said society. *Held*, that the Widows' Society being incorporated for the relief of indigent widows and orphans, the gift was not too general, and was for charitable purposes, and not for indefinite benevolence.

7. Where a will devised, on certain conditions, a gift over, of devises and bequests already made: *Held*, that said provision did not vitiate said devises and bequests.
8. A gift for a library and academy of arts and sciences is for an "educational purpose," and is authorized by section 8157 of the Code of Georgia.
9. Where a charity is definite, the court of chancery will provide a trustee if none is named, or if the one named is incompetent to act.
10. A general power was given to the Georgia Historical Society to take and hold goods and lands, with a proviso that the clear annual income should not exceed a stated sum: *Held*, that a devise which increased the income of the society beyond the sum limited, was not void; if the society accepted the trust, that might be cause for forfeiting its charter.
11. Where a corporation has power to hold property, and is forbidden to hold beyond a certain amount, the matter being one of degree merely, it is not a question of *ultra vires*, but of violation of its charter.
12. That provision of the constitution of Georgia of 1868 (Code of 1873, sec. 5068), which declares that the general assembly shall have no power to grant corporate powers and privileges to private companies, except to banking and other business companies named, but shall prescribe by law the manner in which such powers shall be exercised by the courts, does not take away from the general assembly the power to make amendments to existing charters, or give that power to the courts.
13. A corporation may be a trustee, if not prohibited; with the qualification, perhaps, that the object of the trust shall be germane to, or in harmony with, the objects of the corporation.
14. The requirement, in the devise, of a building to be used for the purposes of a library, that the name of the testator should be engraved on a marble slab to be placed and kept over the main entrance, does not render the devise void.
15. A devise for the "building and erection and endowment of a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for," is not void for uncertainty as to the beneficiaries of the charity.
16. The devise mentioned in the preceding head-note directed that the income and profits of the residuum of the testator's estate should be applied to the erection and endowment of a hospital, and the testator

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expressed a desire that an act of incorporation should be obtained for the hospital, but no time was fixed for the erection of the building or the obtaining of the charter. *Held*, that the devise was not void for uncertainty in these respects.

17. If a devise for a charity cannot be carried out in the particular manner contemplated by the testatrix, a court of equity can and will provide proper trustees to carry it out.
18. The state of Georgia has not inadvertently or otherwise deprived itself of the power of creating a charitable corporation.
19. A devise to trustees for a charitable purpose, which is to be carried on by them until a building, to be erected for the charity, shall be completed, which is then to be handed over by the trustees, with the funds to support it, to a corporation to be created, creates no perpetuity.

IN EQUITY. Heard on demurrer to the bill.

Mary Telfair was a maiden lady, a resident of Savannah, Georgia. She died June 1, 1875, leaving a will by which she disposed of her entire estate. Her nearest relatives were the great-grand-children of a brother, the grand-children of a paternal uncle, and the grand-children of a maternal aunt. The probate of the will was resisted by representatives of each of these classes of relatives. The result of the litigation was that the will was established as the last will and testament of Miss Telfair, and was duly admitted to probate as such. See *Wilter, Guardian, et al. v. Habersham et al.*, 60 Ga., 193, and *Jones et al. v. Habersham et al.*, 60 Ga., 203.

The bill in this case was filed by the representatives of certain persons claiming to be of kin to the testatrix, to attack and annul certain devises and bequests in the will contained, on various grounds fully set out in the bill. The clauses of the will assailed, and the grounds on which they were claimed to be void, will appear in the opinion of the court.

The defendants, executors of the last will of Miss Telfair, demurred to the bill, and upon the demurrer the cause was argued and decided.

Messrs. W. W. Montgomery and J. R. Saussy, for complainants:

1. The tenth item of the will is void for uncertainty: Code of Georgia, secs. 2468, 3155, *et seq.*

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The trust is *ultra vires*, and the devise being indivisible, the whole fails: *Cherry v. Mott*, 1 Mylne & Cr., 123. A bequest which is void in part fails altogether: *Atty.-Gen. v. Davies*, 9 Ves., Jr., 535; *Chapman v. Brown*, 6 Ves., Jr., 404; *Fontain v. Ravenel*, 17 How., 369; *Wheeler v. Smith*, 9 How., 55.

An illegal condition annexed to a gift is void: Code of Georgia, sec. 2661. Prohibition of alienation voluntary or involuntary, in a devise, is void, as repugnant to the estate devised: *Blackstone Bank v. Davis*, 21 Pick., 42; *Hall v. Tufts*, 18 Pick., 455; *Taylor v. Sutton*, 15 Ga., 109.

The church which is made a trustee under this item of the will is not capable of taking or holding the real estate thereby devised: Charter Act of 1806, sec. 4; Code of Georgia, secs. 2267, 2466.

Conditions *in terrorem* (see second condition of tenth item) are void, and render the devises void: Code of Georgia, 2466; 1 Jarm. on Wills, 836; *Levy v. Levy*, 33 N. Y., 97; *Van Nostrand v. Moore*, 52 N. Y., 12; *Van Kleeck v. Dutch Church*, 20 Wend., 457.

2. The eleventh item is void, because it must appear that property left to corporations by will is necessary to the purposes of their organization, and the contrary affirmatively appears as to the Union Society.

3. The twelfth item is void, because the legatee is uncertain, and benevolent are not necessarily charitable purposes. The charter of the Widows' Society of Savannah does not show the purposes of the incorporation, except as the name may indicate: Charter Acts of 1837, p. 220. The name does not indicate the purpose: *In re Deveaux et al.*, 54 Ga., 673. The trust is, therefore, ineffectually declared, and results to the heirs: Code of Georgia, sec. 2316, par. 4.

4. The legatee under the thirteenth item cannot take until the happening of the condition provided for: 1 Jarm. on Wills, 836; 1 Story's Eq. Jur., sec. 287. It may never happen, hence a perpetuity.

5. Fourteenth item: The Georgia Historical Society is incapable of taking any property whose income is over five

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thousand dollars, and only that much for the purposes specified in the preamble of the charter.

The trust is foreign to the purposes of the society; hence the society cannot accept it: *Angell & Ames on Corp.*, 104; *Andrew v. N. Y. Bible and Prayer Book Society*, 4 Sandf., 156; *Morice v. Bishop of Durham*, 10 Ves., Jr., 521; *Attorney-General v. Davies*, 9 Ves., Jr., 535; *Cherry v. Mott*, 1 Mylne & Cr., 123.

A corporation whose charter forbids it doing more than is granted, cannot take as trustee: *Am. Col. Society v. Gartrell*, 23 Ga., 448.

The amendment to the charter, made since the beginning of this litigation, does not help the charter. The law at the death of testatrix must govern: *Bennett v. Williams*, 46 Ga., 399; *Hargroves v. Redd*, 43 Ga., 146.

An executory devise is never created *per verba de presenti*, but always *per verba de futuro*: *Goodright v. Cornish*, 1 Salk., 226; *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet., 99.

The devise to the Georgia Historical Society is not *when* they shall have their charter amended so as to render them capable of taking, but *per verba de presenti*.

Again, under Code, 5146 (constitution of 1877, art. xii, par. iv), it is impossible to amend the charter of 1839. It is, constitutionally, petrified. Even if the amendment by the court were valid, it would not avail the society for another reason—the whole intention of the testatrix was to intrust the property to a corporation with a perpetual charter. The court could only grant one for twenty years. What is to become of the property at the end of that time? Code, 1688. Nor is the amendment by the legislature valid: Code, 5068, Constitution of 1877, art. iii, sec. vii, par. xviii. It was never accepted: *Angell & Ames on Corporations*, 51–2, 3, 4, 5.

If good, it does not confer power to act as trustee. Nor can the legislature now grant power to one corporation to buy shares in another: Constitution of 1877, art. iv, par. iv. Again, the devise is uncertain. Who are “the proper officers,” and who “the public?”

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The devise is also specific, and cannot, therefore, be executed *cy pres*.

Or, if general, there is no trustee capable of taking, and no beneficiaries sufficiently certain to enable them to maintain a suit for the enforcement of the charity. Hence the bequest is too indefinite, and must lapse: *Grimes's Executors v. Harmon*, 9 Am. R., 690, *et seq.* If the devise lapse, it does not fall into the residuum. Because,

1st. The property is, for the purposes of descent, to be regarded as realty. \$30,000 worth is realty.

Heirs may sue for and recover railroad shares in their own name without intervention of administrator: *Southwestern R. R. Co. v. Thomason*, 40 Ga., 408. As to personalty generally they cannot.

Land, when held by a partnership, is treated in equity as personalty. Nevertheless, a sale of his interest by a member of the firm is within the statute of frauds: *Black v. Black*, 15 Ga., 445. On the death of one partner, his legal representative must join in a deed of the realty by the surviving partners.

Is not land treated as personalty when owned by a corporation or firm only for business or commercial purposes, but for purposes of descent, or where the statute of frauds is involved, is it not subject to the ordinary rules governing realty in such cases?

Rent is due for some purposes at sundown; for others at midnight. If the landlord die between sunset and midnight, the rent goes to the heir, not to the executor: 2 Bouv. Dic., "Rent." Again, the lease of the A. & S. R. R. to the C. R. R., disposes of the entire franchise, and is, therefore, an assignment: 2 Bl. Com., 317. And "rent" only is reserved. Rent issues out of realty alone: 2 Bouv. Dic., "Rent;" Code, 2218, 2237.

2d. Even if personalty, the terms of the residuary clause are so narrowed as to exclude it: *Tucker v. Tucker*, 5 N. Y., 408; *Hughes v. Allen*, 31 Ga., 483; *Williams v. Whittle*, 50 Ga., 523.

3d. The property is not necessary for the purposes of the organization of the corporation contemplated in the residuary

clause: Code, 1676, par. v, 1679. If the value has shrunk since the death of testatrix, that will not open the residuary clause to take in enough to supply shrinkage.

Again, the Supreme Court has decided that lapsed devises do not fall into the residuum, but go to the heirs: *Williams v. Whittle*, 50 Ga., 523. The rules of construction as to both realty and personalty shall be the same: Code, 2245.

The Georgia Historical Society was evidently selected as trustee for the Telfair academy, because it has a perpetual charter. No such charter can now be granted. Hence, if the bequest in the fourteenth item is to be considered a general charity, it would, if in England, be executed by sign manual, because it is out of the power of the courts to give effect to the intention of testatrix. It follows that it must fail in this country.

Again, the devise is not to charity, the charity is incidental only. It is "a monument of vanity" to perpetuate donee's name. It is no charity at all: *Mellick v. President and Guardians of the Asylum*, 4 Eng. Ch. (1 Jacob), 180. Nor will trustees be appointed to give effect to a perpetuity. Bequest to buy books to promote virtue and religion, void for uncertainty: *Brown v. Yeall*, cited in 7 Ves., Jr., 56.

6. The twenty-first item is void for uncertainty. What females are meant? White or black? Whence must they come: *Grimes's Exrs. v. Harmon*, 9 Am. R., 690, *et seq.*

And here is another reason why neither this item nor the fourteenth can be enforced at the instance of the attorney-general, in Georgia. If it be conceded that he has such power in behalf of the citizens of Georgia, he certainly has no such power in behalf of the "public" at large, or of the "females" of the world. *Grimes' Exrs. v. Harmon, supra*, is exactly in point here.

Again, who is to determine what sort of hospital is "suited to the wants of Savannah?" This item is also void as against the law of perpetuity.

When are the executors or "their successors" to build the Telfair hospital? When is the "act of incorporation" to be obtained, and from what "tribunal?" The legislature can-

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not pass such an act: Code, 5068; Constitution of 1877, art. iii, sec. vii, p. xviii.

No power existed under the constitution of incorporating churches, etc., until in 1872 the legislature, perceiving the defect, provided for incorporating academies and churches (Code, 1677), and in 1876 extended the section so as to allow incorporations of church organizations whose operations extended over more than one county: Acts of 1876, p. 34.

At the same session (1876) the legislature passed the act under which the Georgia Historical Society has sought to amend its charter by application to the court: *Ibid.*, 33.

As that act only provides for amendments by the courts of such legislative charters as belong to the class "contemplated" by section 1676, and as that section contemplates business corporations alone, it follows that the attempt to amend the charter of the society under that act is futile. But if good, the law at the death of testatrix must govern: *Hargroves v. Redd*, 43 Ga., 142.

This, then, is the extent to which the legislature has yet gone under the present constitution in conferring power upon the courts to grant charters.

So here again the law against perpetuities applies. First, the legislature must pass an act authorizing some court to grant the desired charter, and then the court may or not (as *In re Deveau et al.*, 54 Ga., 673), in its discretion, grant it.

Provision in a will impossible to fulfill under existing laws void: *Adams v. Bass*, 18 Ga., 130.

A gift to a corporation to be created, which cannot be incorporated under existing laws, must fail: Perry on Trusts, sec. 730; *Zeisweiss v. James*, 63 Penn. St. R., 465.

Note in case last cited, distinction between an unincorporated society already in existence, and for definite purposes, and a corporation hereafter to be formed and incorporated out of persons not yet associated for any purpose.

Some of the decisions say, that a devise or bequest to a society to be incorporated, is good by way of executory devise, if the incorporation must necessarily take place within the legal limit; *i. e.*, a life or lives in being, and twenty-one

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years: *Holmes v. Mead*, 52 N. Y., 332; *Fontain v. Ravenel*, 17 How., 360. Otherwise, the devise is void: *Leonard v. Bell*, 58 N. Y., 676.

The corporation to be created is the residuary legatee.

"The trustees, managers, or directresses," as the will calls them, must first be incorporated before they can act.

The executors are only the trustees, to build and turn over. This does not make them trustees of the charity: *Zeisweiss v. James*, *supra*; *Beekman v. Bonsor*, 23 N. Y. R., 298.

The gift of the entire income being to the future corporation, carries *corpus*: Code, 2455; *Smith v. Dunwoody*, 19 Ga., 237.

When is the bequest to take effect?

1. Not until a law is passed authorizing the court to grant the charter.

2. Not until the charter is granted by the court.

3. Not until the hospital is built by the executors, "or their successors."

4. Not until the ladies named "consent" to become incorporators.

5. Not until some one (who?) determines what the wants of Savannah are in this respect.

6. Not until the Hodgson Memorial Hall is completed and paid for out of the estate of testatrix.

Is it not possible that one or more of the conditions may be unfulfilled at the end of a life or lives in being and twenty-one years, and a portion after?

Suppose the present executors decline to build the hospital. Will a court of chancery compel them to do so? May they not, by the terms of the will, leave it to their successors, and they to *their* successors?

A bequest to build hospital and to get charter in two years, "provided two lives named in will should continue so long," not void for remoteness: *Burrill v. Boardman*, 43 N. Y., 254.

It follows, that the building of the hospital is illegal:

1st. Because no reasonable time (a life or lives in being, etc.) is limited within which it must necessarily be built.

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2d. No definite persons are pointed out who are to build the hospital.

3d. No persons are indicated who are to determine what the wants of Savannah are in this respect, and how much is to be expended on the building.

This being so, the balance of the residuary bequest fails, for another reason, to wit: It is impossible to say what may be "the portion of the residuum of my estate, as may not be expended in the building, erection and furnishing said hospital." And the whole bequest fails: *Chapman v. Brown*, 6 Ves., Jr., 404.

Again, the intention of the testatrix is evidently to create a corporation, with perpetual succession. It is to be established on a "permanent basis."

No court can create such a corporation, and the charity, if general, would, in England, fall to the crown, to be effectuated by sign manual; and hence fails here: *Moggridge v. Thackwell*, 7 Ves., Jr., 36.

But, we submit, that under the decisions, this, as well as all the other charitable bequests in the will, is specific, and not general.

If this be so, and the intention of testatrix cannot be carried out, the bequests fall altogether. *Cy pres* does not apply.

Even in general charities, unless the English courts can give substantial effect to the donor's intention *cy pres*, they will not enforce the charity: *Routledge v. Dorril*, 2 Ves., Jr., 357.

Is it likely that the testatrix intended that, at the expiration of the charter, twenty years after granted, the property should be divided among the members? Code, 1688.

7. The twenty-third item is void for uncertainty, and as against the law of perpetuities. In no event can the bequest in this item fall into the residuum. It comes after the residuary clause, and is thus excepted out of it.

Messrs. A. R. Lawton, W. S. Chisholm and W. Grayson Mann, for defendants.

The complainants have not stated a case which entitles them to any relief.

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As heirs at law, they claim there is a resulting trust in their favor.

The Code of Georgia, sec. 2312, provides as follows: "Resulting trust: An implied trust is sometimes for the benefit of the grantor or his heirs, or heirs or next of kin of a testator, and is then a resulting trust."

Section 2316. "Implied trusts: Trusts are implied."

Paragraph 4. "When a trust is expressly created, but no trusts are declared, or are ineffectually declared, or extend only to a part of the estate, or fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs. See, also, Code, secs. 3194 and 2445.

Code, sec. 2456. "Intention of testator: In the construction of all legacies, the court will seek diligently for the intention of the testator, and give effect to the same as far as it may be consistent with the rules of law."

And if this test is applied to the will, there cannot be extracted from it an intention that there should be a resulting trust in favor of the heirs. In fact, if there is one controlling intention pervading the whole will, it is that no one as heir at law shall inherit.

An effect may be given to this intention which "will be consistent with the rules of law" in the state of Georgia. The particular devises which the bill attacks are charitable bequests.

Code of Georgia, sec. 3157, provides: "Subjects of charity: The following are proper matters of charity for the jurisdiction of equity:

"1. The relief of aged, impotent, diseased or poor people.

"2. Every educational purpose.

"3. Provisions for religious instruction or worship.

"4. For the construction or repair of public works or highways, or other public conveniences.

"5. The promotion of any craft, or persons engaging therein.

"6. For the redemption or relief of prisoners or captives.

"7. For the improvement or repair of burying grounds or tombstones.

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“8. Other similar subjects, having for their object the relief of human suffering, or the promotion of human civilization.

“Section 3155. Equity has jurisdiction to carry into effect the charitable bequests of a testator or founder or donor, when the same are definite and specific in their objects, and capable of being executed.”

Code, sec. 3156. “*Cy pres*: If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in a manner next most consonant with the specific mode prescribed.”

Code, sec. 2468. “Bequest to charity: A devise or bequest to a charitable use, will be sustained and carried out in this state, and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it fails, from any cause, a court of chancery may, by approximation, effect the purpose in a manner most similar to that indicated by the testator.”

Code, sec. 3195. “Want of trustee: A trust shall never fail for want of a trustee.”

Code, sec. 3160. “Extraneous evidence: If the terms of a bequest or deed are obscured, doubtful or equivocal, other evidence may be looked up to ascertain the sense in which particular expressions are used, but not to make definite that which in itself is too indefinite for execution.”

The foregoing sections of the Code have been construed together by the Supreme Court of Georgia: *Newson v. Starke et al.*, 46 Ga., 88.

In the above case the law of Georgia, upon charitable bequests, is fully discussed, and being the unanimous decision of the Supreme Court, the law there fixed was the guide to the testatrix.

From that decision the following rules may be established:

The words “definite and specific,” in the Code, mean such as by the usual practice in chancery courts, are held to be “definite and specific:” *Ibid.*, p. 95.

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“If the bequest be to charity generally, or to religion and education generally, the jurisdiction was not in the courts, as such, to carry it into effect; but if the objects of the gifts were stated, though only generally, or if there were a trustee appointed, the court would supply the want of definiteness in the object, or would compel the trustee to carry out the general intent of the testator:” *Ibid.*, p. 95.

The following are cited as instances which have been held not to be too indefinite:

A gift “to the poor;” to a “particular parish or place;” to the “widows or orphans of a parish;” to a “church, to be laid out in bread for the poor:” *Ibid.*, p. 95.

“If the general objects were pointed out, or if the testator had fixed any means for doing so, as by the appointment of trustees for such purpose, courts of chancery treated the bequest as one sufficiently “definite and specific” for judicial cognizance, and carried it into effect, notwithstanding there might remain some indefiniteness and uncertainty:” *Ibid.*

“If there should be no trustee, or if the trustee should fail, the court has power to appoint a master to devise a scheme for carrying the bequest into effect:” *Ibid.*, 95 and 96.

This case overruled *Beall v. Drane*, 25 Ga., 430, and affirmed *Beall v. Fox*, 4 Ga., 404.

And, in the last named case, the statute of 43 Elizabeth, ch. 4, was declared of force in Georgia, and the statute of 9 George II., not of force.

The only restriction upon the right of a testator to devise his property to charity, is contained in Code, sec. 2419; Rev. Code, sec. 2384.

Code, sec. 2419. “Charitable devises: No person leaving a wife or child, or descendants of child, shall, by will, devise more than one-third of his estate to any charitable, religious, educational or civil institution, to the exclusion of such wife or child; and, in all cases, the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void.”

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This section construed by the Supreme Court of Georgia: *Reynolds v. Bristow*, 37 Ga., 283.

Miss Telfair left no lineal heirs, and had never been married. It was, therefore, competent for her to have given her entire property to charity; and, in giving expression to her wishes, it was necessary that she should comply with the laws of Georgia alone, and those laws may be reduced to the following general principles:

1. The objects of the charity should be "definite and specific," according to the meaning of those words in the usual practice of chancery courts. For instance, "to the poor," to "a particular parish or place," "to the widows and orphans of a parish," "to a church to be laid out in bread for the poor."

2. If the objects should not be "definite and specific," the devise must be to a trustee, upon whose judgment the testator will be supposed to have relied to supply any want of definiteness.

3. If no trustee be appointed where the objects are definite and specific as aforesaid, or if a trustee be appointed, and the want of definiteness in that way be supplied, and the trustee should fail, or need judicial aid, the court will appoint a trustee, or a master, to devise a proper scheme for carrying the bequest into effect. And more particularly is this true, where a bequest is to a trustee and his successors.

If these principles are applied to the devises in this will, they will be found valid.

Item tenth. This devise is to the trustees of the Independent Presbyterian church of the city of Savannah. The gift is to the corporation in its corporate name. The object is definite and specific.

Item eleventh. The devise is to the Union Society of Savannah. The object is definite and specific.

Item twelfth. This devise is also to the corporation, the object is definite and specific. The uses in each of these items are all charitable, and the objects of the corporations are also charitable: Perry on Trusts, secs. 706, 699, 712, p. 657.

But even if these devises were not charitable, they are

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good as bequests to the several corporations, which, under their charters and the general laws of Georgia, are empowered to receive donations by gift, grant, devise, etc.: Code, secs. 1679, 2346, 2347; see Charters.

Conditions. The condition against alienation in each of the tenth, eleventh and twelfth items does not render the devises void: *Perin v. Carey*, 24 How., 465; *Stanley v. Colt*, 5 Wall., 119; *McDonogh's Ex'rs v. Murdoch*, 15 How., 367; *Ould v. Washington Hospital*, 95 U. S., 303; *Wilcoxon et al. v. Harrison*, 32 Ga., 480; *Proprietors of Church in Brattle Square v. Grant*, 3 Gray, 142.

The conditions are not illegal, immoral or impossible, and, therefore, do not invalidate the devises; but if they are of that character, the conditions are void, and the devises stand.

Code, sec. 2661: "Void conditions: Impossible, illegal or immoral conditions are void, and do not invalidate a perfect gift."

Code, sec. 2296: "Repugnant conditions: A condition repugnant to the estate granted is void; so are conditions to do impossible or illegal acts, or which in themselves are contrary to the policy of the law."

This very point, in principle, was made in the case of *McDonogh's Ex'rs v. Murdoch* (15 How., 358, *supra*), by the heirs at law, and was decided against them. The statute law of Louisiana being almost in the above language of the Code of Georgia.

Conditions which are repugnant to the legal rights which the law attaches to ownership, the common law pronounces void, and the civil law treats as recommendation and counsel not designed to control the will of the donee: *McDonogh's Ex'rs v. Murdoch*, *supra*.

Subsequent conditions are not favored because they serve to defeat estates.

These conditions are good whenever they are not impossible to be performed at the time, or made so afterwards by the act of God or the grantor, when they are not contrary to law or repugnant to the deed itself.

In all such cases the conditions themselves are void, and

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the party takes an absolute estate at once: *Taylor v. Sutton*, 15 Ga., 109.

But even if these conditions contained in said tenth, eleventh and twelfth items should be held to defeat the devise, still there would be no resulting trust in favor of the heirs at law, for the reason that the thirteenth item provides that for breach of conditions, the executors are directed to enter and dispossess the original legatee, and the estate is given to the Savannah Female Orphan Asylum. Where property was given to one charity to go over to another in a certain event, it was allowed to go over to the second charity after the lapse of two hundred years, on the ground that it was no more a perpetuity in one charity than in the other: Perry on Trusts, sec. 736, p. 687; *Christ's Hospital v. Grainger*, 1 McN. & G., 460.

Item Fourteenth. This is a devise to the Georgia Historical Society, and its successors, of the lot on St. James's Square, with the pictures, books, etc., in special trust, to keep and preserve the same as a public edifice for a library and academy of arts and sciences, etc., "to be open for the use of the public," etc.

The object here is clearly a charity: Perry on Trusts, sec. 700; Jarman on Wills, 236.

The testatrix intended the gift for "educational purposes," and for "the promotion of human civilization:" Code of Georgia, sec. 3157.

The devise is to a corporation, the Georgia Historical Society, and its successors. A corporation may be a trustee to carry out a charitable bequest (*Vidal v. Girard's Ex'rs*, 2 How., 127; *Perin v. Carey*, 24 How., *supra*) unless prohibited by charter: *Am. Colonization Society v. Gartrell*, 23 Ga., 448.

If the trust be not germane to the powers and purposes of the corporation, the corporation cannot be compelled to act, but the devise does not fail: *McDonogh's Ex'rs v. Murdoch*, 15 How., *supra*; *Vidal v. Girard's Ex'rs*, 2 How., *supra*; Code of Georgia, secs. 3195, 3197.

If the corporation be willing, but not competent under the

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charter, this is a question for the state and not for the heirs: *Wade v. Colonization Society*, 15 Miss., 663; *Vidal v. Girard's Ex'rs*, 2 How., *supra*.

In this case the devise is to the Georgia Historical Society, and its successors. It is, therefore, to be presumed that the testatrix anticipated that there might be a substitute for her first choice: Perry on Trusts, sec. 721.

As to the conditions attached to this devise, they are mere details which are to be treated as recommendations, but which do not invalidate the gift.

See cases already cited on conditions.

The conditions are so much in detail, and the charitable intention of the testatrix is so plain, that a court of chancery could, with the aid of a master, carry the bequest into effect: *Newson v. Starke*, 46 Ga., 88.

Item Seventeenth. This contains a gift of \$30,000 to the Presbyterian Church in Augusta, or to the trustees thereof, and its or their successors. The statement of the devise is the best argument which could be made to sustain it.

Item Twenty-first. This contains the devise of the residuum to the executors, and their successors, *in trust*, etc., to build a hospital for sick and indigent females, etc., and to obtain a charter, etc. In addition to the authorities already cited, in this connection particular attention is asked to the consideration of the cases of *Ould v. Washington Hospital*, 95 U. S., 303; *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet., 99.

Item Twenty-third. This contains two gifts: \$1,000 to the Hodgson Institute in Telfairville, Burke county, Ga. This is clearly valid. And \$1,000 to the first Christian church erected or to be erected in said village of Telfairville. The executors are made trustees, and if the church is not now erected, the court would hold up the fund a reasonable time. If the contingency fails to happen, the court will apply the fund *cy pres*: *Attorney-General v. Bishop of Chester*, 1 Bro. Ch., 444; *Attorney-General v. Oglander*, 3 Bro. Ch., 166; *Ould v. Washington Hospital*, 95 U. S., *supra*.

But if this devise were void, being a gift of money, there

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would be no resulting trust for the heirs at law; the fund would fall into the residuum: *Wood et al. v. Mitchell Exr.*, 32 Ga., 623; *Williams v. Whittle*, 50 Ga., 523.

Railroad stock is personalty in this state: Code, sec. 2237; *Southwestern R. R. Co. v. Thomason*, 40 Ga., *supra*.

Item Twenty-second. This item contains the expression upon which is based the claim that the entire will is void, under the law against perpetuities. "It is my wish, and I hereby so direct, that none of the legacies, bequests and devises in any of the clauses of this, my will, shall be executed or take effect until the building and other improvements on the lot on the corner of Whitaker and Gaston streets, and known as the Hodgson Memorial Hall, which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate."

The bill states "that the building and other improvements referred to were in the course of construction at the time of the death of testatrix, but were not completed until many months thereafter, and whether yet entirely paid for, your orators are not certainly informed. If not paid for, it is the only debt known to your orators now existing against said estate."

Code, sec. 2451: "Assets to pay debts: All property, both real and personal, in this state being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy."

Code, sec. 2547: "Duty as to contracts: The administrator must, as far as possible, fulfill the executory and comply with the executed contracts."

The said twenty-second item is but a statement of the general law, and if stricken out, Code, sections 2451 and 2547, would take its place. And should the construction contended for by complainants be placed upon this section of the Code, no one could make a will in Georgia, valid under the law of perpetuities, who should die leaving unfinished, and not entirely paid for, any house, building or other improvement.

Each legatee, upon the death of the testatrix, acquired such an interest in the respective legacies that, if the execu-

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tors capriciously delayed the payment of debts and withheld their assent, he could in equity have compelled the assent: Code, sec. 2452.

All the devises, bequests and legacies in the will are immediate and not mediate. These words were originally used and a technical meaning given to them by Lord Hale: *Collingwood v. Pace*, 1 Vent., 413.

If the gift, devise or bequest is direct to the legatee or devisee, without passing through another, it is immediate. In this case all the gifts are directly to the legatees or devisees mentioned in the respective items of the will, or they are to William N. Habersham and William Hunter, who are nominated "as executors of this my last will and testament, and *trustees* under the provisions of the same."

"When a will directs acts to be done which necessarily require the intervention of a trustee to hold the property, the executor is a trustee by necessary implication:" *Nash v. Cutler*, 19 Pick., 67; *Bennet v. Batchelor*, 1 Ves., Jr., 63; *Gordon v. Green*, 10 Ga., 534.

In this case the testatrix not only directs acts to be done which require the intervention of a trustee (if the payment of her debts and the completion of the building and other improvements on the lot on the corner of Gaston and Whitaker streets known as Hodgson Memorial Hall, be such acts), but expressly declares that Habersham and Hunter are nominated executors and trustees under the provisions of the will. The various legatees are the beneficiaries. Construe, then, the entire will, and the scheme of the testatrix is, that her whole estate should pass to Habersham and Hunter, as executors and trustees, to carry out her intentions. They are instructed to complete and pay for, out of her entire estate, the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as Hodgson Memorial Hall, which has been conveyed in trust to the Georgia Historical Society; and when this charity, begun in her life time, shall have been completed and entirely paid for out of her estate, then these trustees are directed to assent to and turn over the legacies according to the other provisions of

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the will. The trust, if any, is to perfect a charity commenced in the life time of the testatrix, and to execute the provisions of the will. In such case, as already cited, when property was given directly to one charity to go over to another in a certain event, it was allowed to go over to the second charity after a lapse of two hundred years, on the ground that it was no more a perpetuity in one charity than in the other: Perry on Trusts, sec. 737, p. 687, and cases cited in the text.

“The disposition which he makes of any surplus, after the complete organization of the colleges, is a good charitable use for poor white male and female orphans:” *Perin v. Carey*, 24 How., 465.

Charitable uses are never void for perpetuity, and but rarely for uncertainty in America: Wagram on Wills, pp. 406—401; Tudor on Charities, p. 207.

There being a gift to charity, remoteness is out of the case—that doctrine has no application to a charity: *Chamberlayne v. Brockett*, 8 Law Rep. (Ch. App.), 206; *Christ's Hospital v. Grainger*, 1 McN. & G., 260.

There may be a use or trust upon a use or trust: Code, sec. 2315.

Code, sec. 2311: “An express trust may depend for its operation upon a future event, and is then a contingent trust. It may operate in favor of additional or other beneficiaries upon specified contingencies, and is then a shifting trust.”

But the complainants rely upon the following extract from the opinion of Judge Swayne, in the case of *Ould v. Washington Hospital*, *supra*: “There may be such an interval of time possible between the gift and the consummation of the use as will be fatal to the former. The rule of perpetuity applies to trust as well as to legal estates. The objection is as effectual in one case as in the other. If the fatal period may elapse before what is to be done can be done, the consequence is the same as if such must inevitably be the result. Possibility and certainty have the same effect; such is the law.”

The bill alleges, on this point, as follows: “And your

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orators show that the building, and other improvements referred to, were in course of construction at the time of the death of testatrix, but were not completed till many months thereafter, and whether yet entirely paid for your orators are not certainly informed. If not yet paid for, it is the only debt known to your orators existing against said estate."

The appraised value of the estate is placed at \$650,000.

If "can be done" is to be ascertained by what has been done, then there has never been the least possibility of the lapse of the fatal period in this case. The building and improvements, says the bill, were in course of construction; there was but one debt, and it has, in fact, says the bill, required but a few months to complete this work. The law regards that as certain which can be made certain. If the executors had been dilatory, a court of equity could have compelled the completion of and payment for the work.

The nineteenth chapter of "Lewis on Perpetuities" concludes the subject on indefinite contingencies as follows: "In fine, let the event contemplated be what it may, and the probability of its early occurrence as great as it may, it will, in every case be of too remote expectancy, and a limitation depending upon it will, therefore, always be void, unless either from the nature or internal quality of the contingency, or from express provisions and restrictions it be certain, that the event which is to give effect to the limitation will happen, if at all, within the period of lives in being, and twenty-one years:" Lewis on Perpetuities, 481.

The contingency relied on in this case, is the completion of a building, and other improvements which were in the process of construction at the death of testatrix, and finished several months after her decease. Is there anything in the nature or internal quality of such a pretended contingency to make a perpetuity? The estate was wealthy; the fulfillment of that executory contract of the testatrix was a legal certainty, and not a contingency.

In *Henshaw v. Atkinson*, Sir John Leach uses the following language: "It is argued that it was the testator's intention that the charities were not to take effect until lands or

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buildings were supplied by others, and that the money may be locked up for an indefinite period of time, and, therefore, that the bequest cannot be sustained. The cases of *Downing College*, Amb., 550, and *Attorney-General v. Bishop of Chester*, 1 Bro. Ch., 444, seem to be authority against that objection :” 3 Madd., 306.

But if, as already contended, the gift is immediate, either to the legatees or to Habersham and Hunter, as trustees under the provisions of the will, the devise is good, although the enjoyment or consummation of the use may depend upon uncertain events. In such cases, the court will hold up the gift a reasonable time to await the happening of the contingency : *Attorney-General v. Bishop of Chester*, 1 Bro. Ch., 444 ; *Attorney-General v. Oglander*, 3 Bro. Ch., 166 ; *Chamberlayne v. Brockett*, 8 Law Rep. (Ch. App.), 206.

In this case, the contingency, if any ever existed, has already happened, and the intention of the testatrix expressed in clear and unambiguous terms, can be carried into full effect. Mr. Justice Swayne, in *Ould v. Washington Hospital*, *supra*, said : “It is a cardinal rule in the law, that courts will do this whenever it can be done. Here we find no impediment in the way. The gift was *immediate and absolute*, and it is clear, beyond doubt, that the testator meant that no part of the property so given should ever go to his heirs at law, or be applied to any object other than that to which he had devoted it.”

“Charitable uses are favorites with courts of equity. The construction of all instruments, where they are concerned, is liberal in their behalf. Even the stern rule against perpetuities is relaxed for their benefit :” 95 U. S., 313.

See, also, *Beall v. Fox*, 4 Ga., 404.

BRADLEY, Circuit Justice. This is a bill filed by the heirs at law of Mary Telfair, seeking to have the devises and bequests of her last will adjudged inoperative and void, and a resulting trust in all of her estate declared in favor of said heirs, and that they may have a decree for their distributive

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shares thereof. The defendants demurred, and the question now arises on the demurrer.

The will was made on the second day of June, 1875, when the testatrix was far advanced in years, and the probate thereof was strenuously contested, on various grounds, but was finally established on appeal by the Supreme Court of Georgia.

The testatrix was never married, and had no relations except collaterals in the third and fourth degree. A great portion of her estate, which is alleged to have been of the value of \$650,000, was given to charities.

A fundamental objection raised by the complainants to all the devises and bequests, arises on the twenty-second item of the will, which is as follows:

"Twenty-second. It is my wish, and I hereby so direct, that none of the legacies, bequests and devises in any of the clauses of this, my will, shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as the 'Hodgson Memorial Hall,' which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate."

It is contended that this postponement of the execution and effect of the devises and bequests violates the rule against perpetuities, and renders them inoperative and void. The bill alleges that the building and other improvements referred to were in course of construction at the time of the death of testatrix, but were not completed till many months thereafter, and whether yet entirely paid for, the complainants were not certainly informed. If not paid for, it was the only debt known to the complainants existing against said estate. The complainants concede the English rule to be, that where there is an immediate gift to trustees for a general charity, but the particular application of the fund will not of necessity take effect within any assignable limit of time, and can never take effect at all, except on the occurrence of events in their nature contingent and uncertain, the gift is valid, and the court will hold up the fund a reasonable time, and await the happening of the contingency.

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Reference for this is made to the cases of the *Attorney-General v. The Bishop of Chester*, 1 Bro. Ch., 444; and to *Attorney-General v. Oglander*, 3 Bro. Ch., 166. But the complainants question whether this rule can be applied in Georgia; and they contend that, whether it can or cannot, there is no immediate gift of the property in the mean time, before the contingency happens. The last clause of the will, it is true, after appointing executors of the will, makes them also "trustees under the provisions of the same;" but it is contended that this does not operate as a devise to them of the real estate.

In considering this objection to the validity of the dispositions of the will, it is to be observed, in the first place, that all the gifts therein contained are immediate in form. Thus, the first item declares: "I hereby give, devise and bequeath to George Noble Jones, son of the late Noble Wymberly Jones, all that full lot of land in the city of Savannah," etc. (going on to describe it), "to him and his heirs forever." The tenth item declares thus: "I hereby give, devise and bequeath to the trustees of the Independent Presbyterian church, of the city of Savannah, all that full lot of land," etc., going on to describe the same, and to declare the purposes for which the gift was made. It seems to us, therefore, that the gift itself is not suspended upon the completion of the Hodgson Memorial Hall, and the payment thereof; but only the execution and carrying into effect thereof. Some of the gifts are pecuniary legacies. If this view is correct, the gift of these legacies is not suspended, but only the payment thereof. This seems to us to be the intent of the testatrix. No one can read the whole will and believe that the testatrix, for one moment, had in her mind the revocation or non-operation of the gifts themselves. The Memorial Hall was begun at the time the will was executed, and was so far constructed as to be completed within a few months afterwards. Its plan and extent must have been designed, and its cost must, within probable limits, have been anticipated. It was her desire that the executors and trustees should finish that building, and pay for it, before the other legacies should be

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paid or the other donations carried into effect. If any unreasonable delay should occur in this behalf, of course it would be competent for any of the beneficiaries under the will to compel the trustees to proceed. But it being an obligation of her estate, incurred under her own directions, she wished it discharged before the other donations of her will should be carried out, and she is, therefore, emphatic on the subject. There is reason in what the counsel for the defendants say, that this provision is in effect what the law of Georgia requires or allows in all cases. Section 2451 of the Code declares that "all property, real and personal, in this state, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy." In other words, the payment of debts and the fulfillment of obligations are the first things to be executed before the devises and bequests can be carried out without the assent of the executors. The completion of this Memorial Hall was an obligation already incurred, and the will merely requires what the law virtually requires, or allows the executors to require, in all cases.

Before proceeding further, it may be proper to cite the provisions of the Code of Georgia on the subject of charities. The most important for the purposes of this case are the following:

Section 2468. A devise or bequest to a charitable use will be sustained and carried out in this state; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done fails from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

Section 3155. Equity has jurisdiction to carry into effect the charitable bequest of a testator, or founder, or donor, when the same are definite and specific in their objects, and capable of being executed.

Section 3156. If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in

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a manner next most consonant with the specific mode prescribed.

Section 3157. This section specifies the subjects which are proper matters of charity for the jurisdiction of equity, corresponding nearly to the 43 Elizabeth.

By these provisions, it will be seen that the law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal prerogative is exercised.

We will now proceed to consider the objections which have been urged against the several charitable dispositions of the will. The first of these is contained in the tenth item, and is a gift to the trustees of the Independent Presbyterian Church of the city of Savannah, of a certain lot of land in Savannah, with the buildings and improvements thereon, upon the following terms and conditions, to wit :

“ *First.* That the trustees of the said Independent church shall appropriate annually out of the rents and profits of said lot and improvements the sum of one thousand dollars to one or more Presbyterian or Congregational churches in the state of Georgia in such destitute and needy localities as the proper officers of said Independent Presbyterian church may select, so as to promote the cause of religion among the poor and feeble churches of the state. *Second.* This gift and devise is made on the further condition that neither the trustees nor any other officers of said Independent Presbyterian church will have or authorize any material alteration or change made in the pulpit or galleries of the present church edifice on the corner of Bull and South Broad streets, but will permit the same to remain substantially as they are, subject only to proper repairs and improvements ; nor shall they sell or alien the lot on which the Sabbath school-room of said church now stands, but shall hold the same to be improved in such manner as the trustees or pew-holders may direct. *Third.* Upon the further condition that the trustees of said Independent Presbyterian church will keep in good order and have thoroughly cleaned up every spring and autumn my lot in the cemetery of Bonaventure, and that no interment or burial of any person shall ever take place either in the vault

or within the inclosure of said lot; and for the purpose of having the same protected and cared for, I hereby give, devise and bequeath my said lot in the Bonaventure cemetery to the trustees of the Independent Presbyterian church, and their successors."

Various objections are raised to this gift, which will be considered in due order.

First. It is objected that it is void for uncertainty. This objection cannot prevail. The appropriation of a certain sum of money annually to one or more Presbyterian or Congregational churches in the state of Georgia in such destitute and needy localities as the trustees may select, so as to promote the cause of religion among the poor and feeble churches of the state, is a definite charitable object, much more so than hundreds of cases to be found in the books which have been sustained. The circumstances under which this opinion is prepared will not allow us to cite authorities for all the conclusions to which we have arrived, and, therefore, we shall content ourselves, in most instances, by simply stating them. We can only say that on the point under consideration we have no doubt whatever. It requires but a slight knowledge of the law of charities to determine a question of this kind. Almost all charities describe their objects in general terms, indicative of the particular kind of good to be effected thereby. When this is done the charity is definite, although the particular objects are indefinite.

Another object declared in this item is to keep in good order the testatrix's burying lot in the cemetery of Bonaventure. This is sufficiently definite, and is clearly authorized by the Code of Georgia (Code, section 3157); although it was once held not to be a proper object of a charitable disposition: Perry on Trusts, section 706. It is somewhat singular that it should ever have been doubted, since the sanctity of tombs and other places of rest for the dead has always been an object of cherished regard since the establishment of Christianity, and received the peculiar care of the Roman law.

Second. Another objection made to this devise is that

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it is accompanied with a condition which renders it void, namely, not to allow any alteration to be made in the pulpit or galleries of the church edifice of the trustees, nor to alien the lot on which the Sabbath school room of said church stands, but to hold the same to be improved in such manner as the trustees or pew-holders may direct. So far as this condition is expressive of a direction to keep the pulpit or school house in repair, it is a proper charity. So far as it may be construed as a condition, as for example, a condition against changing the form of the pulpit, or alienating the land, if unlawful (which we do not affirm), it is nevertheless a condition subsequent, and cannot affect the charitable gift. It is a condition subsequent, because it relates to the future after the gift is designed to take effect.

Third. The next objection is, that the trustee named being a corporation of definite powers, not including that of holding property in trust for any other object than that connected with the church as a religious society, is incapable of receiving or administering the trust.

Supposing, for the sake of argument, this to be true, still the charity will not be permitted to fail, but the court of chancery has full power to supply the want of a legal trustee. A definite charity is not allowed to fail for want of a trustee. The Code expressly says: "A trust shall never fail for the want of a trustee:" Section 3195.

But we are inclined to think that the corporation may administer this trust. Every religious society or church has, from the very nature of the Christian religion and Christian institutions, a missionary vocation as old as the apostolic times; and it is not foreign to its purposes to extend aid to sister churches, or to promote the cause of Christianity, and especially of the particular form of Christianity which it professes, in places of destitution or ignorance.

Another objection founded on the terms of the thirteenth item of the will, will be considered hereafter.

The next gift is contained in the eleventh item of the will, and is in these words:

"*Eleventh.* I give and devise to the Union Society of

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Savannah all that lot or parcel of land in the city of Savannah on the north side of Bay street, and at or near its intersection with Jefferson street, extended or prolonged, known in the plan of said city as lot letter 'B,' with the buildings and improvements thereon, but on the express condition that said society shall not sell or alienate said lot, but shall use and appropriate the rents and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society."

This gift is objected to on account of the condition against alienation, and because the Union society has already a surplus of funds. The condition is nothing but a condition subsequent, and if void, does not vitiate the gift. But we are not aware that a condition against alienation annexed to property devoted to a charity has ever been held to be void. Charity property, as a general thing, cannot be alienated without the aid of the court of chancery. Its normal character is to be inalienable, and the condition only expresses that character. The court, notwithstanding the condition, would probably, if a proper case arose, make a decree allowing it to be alienated for the good of the charity. (See *Perin v. Carey*, 24 How., 465.)

The objection that the Union society has more funds already than are needed or can be used for the purposes of its institution is not supported by the allegations of the bill. The fact that a charitable society is well managed, and does not spend its entire income, but increases, as it may occasionally, its capital, is no evidence that its sphere of usefulness may not be greatly enlarged by an accession of new capital.

The twelfth item of the will is as follows:

"*Twelfth.* I give, devise and bequeath to the Widows' Society of Savannah, all that lot or parcel of land in Savannah on the corner of President and West Broad streets, on which the improvements now consist of four brick tenement buildings, the rents and profits of the same to be appropriated to the benevolent purposes of said society; but this devise is made on condition the said Savannah Widows' Society shall

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not sell or alienate said lot or improvements, nor hold the same subject to the debts, contracts or liabilities of said society."

It is objected to this item that the gift is too general, being for benevolent purposes indefinitely, which are not necessarily charitable. But it is for *the* benevolent purposes of the donee, the Widows' Society of Savannah. By turning to the charter of this society we find that it is incorporated and made a body politic, by the name and style of the Savannah Widows' Society, for the relief of indigent widows and orphans. This is sufficiently expressive of its charitable objects. But it is insisted that this declaration of the purpose and object of the society is only a part of its name. This is doubtful; but if it were so, it would still be sufficient to show for what purpose the society was organized, and would lay the foundation of a bill, or information, in equity, to prevent a diversion of its funds to any other purpose. We think the objection is untenable.

The thirteenth item of the will contains a provision which is applicable to the tenth, eleventh and twelfth, which have been considered. It is as follows:

"*Thirteenth.* Should either one or more of the corporate bodies or institutions named in the preceding items of my will attempt to sell, alienate or otherwise dispose of the property and estate therein devised, contrary to the terms and conditions therein set forth, or should there be any levy on the same to satisfy the debts of said corporation, then I hereby direct my executors, or legal representatives, to re-possess and enter upon said property or estate as to which the conditions may be so broken or violated, and in that event I do hereby give and devise the said property so entered upon and re-possessed unto the Savannah Female Orphan Asylum."

Here is a gift over of the property devised in the three previous items upon certain conditions subsequent. It is either valid or invalid. If valid, there is an end to the matter. If invalid, the conditions are inoperative, and the prop-

erty remains as first given. This seems to us so clear that no further observation is required on the subject.

The next item is as follows :

“*Fourteenth.* I hereby give, devise and bequeath to the Georgia Historical Society, and its successors, all that lot or parcel of land, with the buildings and improvements thereon, fronting on St. James’s Square, in the city of Savannah, and running back to Jefferson street, known in the plan of said city as lot letter ‘N,’ Heathcote ward, the same having been for many years past the residence of my family, together with all my books, papers, documents, pictures, statuary and works of art, or having relation to art or science, and all the furniture of every description in the dwelling-house and on the premises (except bedding and table service, such as china, crockery, glass, cutlery, silver, plate and linen), and all fixtures and attachments to the same ; to have and to hold the said lot and improvements, books, pictures, statuary, furniture and fixtures, to the said Georgia Historical Society, and its successors, in special trust, to keep and preserve the same as a public edifice for a library and academy of arts and sciences, in which the books, pictures and works of art herein bequeathed and such others as may be purchased out of the income, rents and profits of the bequest hereinafter made for that purpose, shall be permanently kept and cared for, to be open for the use of the public on such terms and under such reasonable regulations as the said Georgia Historical Society may from time to time prescribe ; but this devise and bequest is made upon condition that the Georgia Historical Society shall cause to be placed and kept over and against the front porch or entrance of the main building on said lot a marble slab or tablet, on which shall be cut or engraved the following words, to wit : ‘Telfair Academy of Arts and Sciences,’ the word ‘Telfair’ being in larger letters and occupying a separate line above the other words ; and, on the further condition, that no part of the building shall ever be occupied as a private residence, or rented out for money, and none but a janitor, and such other persons as may be employed to manage and take care

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of the premises, shall occupy or reside in or upon the same, and that no part of the same shall be used for public meetings or exhibitions, or for eating, drinking or smoking; and that no part of the lot or improvements shall ever be sold, alienated or incumbered, but the same shall be preserved for the purposes herein set forth. And it is my wish, that whenever the walls of the building shall require renovating by paint or otherwise, the present color and design shall be adhered to, as far as practicable. For the purpose of providing more effectually for the accomplishment of the objects contemplated in this item or clause of my will, I hereby give, devise and bequeath to the Georgia Historical Society, and its successors, one thousand shares of the capital stock of the Augusta & Savannah railroad, of the state of Georgia, in special trust, to apply the dividends, income, rents and profits arising from the same, to the repairs and maintenance of said buildings and premises, and the payment of all expenses attendant upon the management and care of the institution herein provided for, and then to apply the remaining income, rents and profits in adding to the library, and such works of art and science as the proper officers of the Georgia Historical Society may select, and in the preservation and proper use of the same, so as to carry into effect in good faith the objects of this devise and bequest."

The charity indicated in this gift is a very meritorious one, and is authorized by the Code (section 3157) under the general class of "every educational purpose," which undoubtedly embraces public libraries. The principal objection to the gift is, that the donee, the Georgia Historical Society, is incapable of taking it. But if this were true, as before stated, where the charity is definite, the court of chancery will provide a trustee, if none is named, or if the one named is incompetent to act.

It seems to us, however, that the gift to the Georgia Historical Society is not void. One ground of objection is, that whilst a general power is given to the society to take and hold goods and lands, it is coupled with a proviso that the clear annual income of such real and personal estate shall not

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exceed the sum of five thousand dollars; whereas the bill states that the income of the society was already between three and four thousand dollars at the time of the gift, which will increase it seven thousand dollars more. This, if the society accepted the trust, may have been cause of forfeiting its charter; but the gift would none the less be vested in it. To hold otherwise would be to render the society exempt from any inquiry on the subject at the suit of the state, for the answer would be: "We cannot hold more property than our charter allows, and, therefore, we do not." Certain things are *ultra vires* of a corporation; but when it has the power to hold property, and is forbidden to hold beyond a certain amount, the matter being one of degree merely, or of more and less, this is not a question of *ultra vires*, but of violation of its charter. A contrary rule would involve many absurdities. Suppose a corporation has no more property than its charter allows, but by an enhancement of values it grows into an excess of that allowance, to what particular portion of its property does its title become void? Is the whole affected by the vice? The answer plainly is, the title to none of it becomes void; but the corporation may be amenable to the penalty of violating its charter. Individuals cannot call it in question; its tenants must continue to pay its rents, and its debtors their debts; the state alone has the right to proceed against it. The state may or may not see fit to do so. It would depend on the circumstances of the case, the greatness of the excess, the causes which led to it, etc. The state may condone the offense. The legislature may relieve by enlarging its power. In the present case the defendants contend that the Georgia Historical Society has been relieved by an amendment to its charter, passed in 1870, by which the proviso in question was repealed. The complainants insist that this amendment was unconstitutional, because the constitution of 1868 declares that the general assembly shall have no power to grant corporate powers and privileges to private companies, except to banking and other business companies named; but shall prescribe by law the manner in which such powers shall be exercised by the courts.

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But "corporate powers and privileges" are powers and privileges which appertain to a corporation as such; its corporate franchise is not every power that a corporation has which is a corporate power. The intent of this prohibition undoubtedly was to relieve the legislature from applications to create private corporations of a certain class, such as benevolent, religious, literary, etc. It did not take away the power to make amendments to existing charters, nor intend to give that power to the courts. Suppose there had been a general law of mortmain, forbidding all religious corporations to hold land, would the constitution prevent the legislature from repealing it? Yet, by repealing it, existing corporations would have a new accession of power—not of corporate power, but of power to hold property.

We think the amendment of 1870 was valid.

That a corporation may be a trustee, if not prohibited, has been frequently held: *Vidal v. Girard's Ex'rs*, 2 How., 127; *Perin v. Carey*, 24 How., 465; *McDonogh's Ex'rs v. Murdoch*, 15 How., 367; *American Colonization Society v. Gartrell*, 23 Ga., 448. It may be a qualification that the object of the trust should be germane to, or in harmony with, the objects of the corporation. If this is true, what more appropriate existing corporation in Georgia could have been selected as trustee for the proposed library than the Georgia Historical Society? The presence of the library would greatly promote the objects of its incorporation. The charter declares that it shall be construed benignly and favorably for every beneficial purpose therein intended.

In our judgment, the gift in this case took effect in the society as trustee.

The other objections to this item, relating to the inscription to be placed on the building, etc., are not tenable. It is a laudable ambition to wish to transmit one's name to posterity by deeds of beneficence. The millionaire who leaves the world without doing anything for the benefit of society, or for the advance of science, morality or civilization, turns to dust, and is forgotten; but he who employs a princely fortune in founding institutions for the alleviation of suffering,

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or the elevation of his race, erects a monument more noble, and generally more effectual to preserve his name, than the pyramids. Thousands of the wealthy and the noble, in the early days of English civilization are deservedly forgotten; but the founders of colleges in Oxford and Cambridge will be borne on the grateful memories of Englishmen as long as their empire lasts. Harvard and Yale, in our own country, are pertinent examples of this truth.

The seventeenth item of the will gives thirty thousand dollars to the Presbyterian church of the city of Augusta, to be appropriated in building a commodious Sunday school house and library on a portion of its lot. We do not remember that any peculiar objections were raised to this bequest.

The twenty-first item is as follows:

“Twenty-first. All the rest and residue of my estate, of whatever the same may consist, real, personal and mixed, and wherever situated, I hereby give, devise and bequeath to my executors hereinafter named, and to the survivor of them, and to the successors in this trust of said survivor, in trust, to use and appropriate the proceeds arising from the same to the building and erection and endowment of a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for, in such manner and on such terms as may be defined and prescribed by the trustees or directresses provided for in this item or clause in my will. The income, rents and profits of such portion of the residuum of my estate, as may not be expended in the building, erection and furnishing said hospital, shall be annually appropriated to the support and maintenance of the same. My desire and request is that a thoroughly convenient hospital, of moderate dimensions, suited to the wants of the city of Savannah, and capable of enlargement, if necessity should require, may be built and erected, with no unnecessary display connected with it. And I do hereby nominate as first trustees, managers or directresses of said hospital, Mrs. Louisa F. Gilmer, Sarah Owens, Mary Elliott (formerly Habersham), Susan Mann, Florence Bourquin, Eva West, and Eliza Chisholm,

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all of Savannah, Georgia, and do request and instruct my executors to advise and consult with the ladies named as to the construction, arrangement and furnishing of said hospital. It is further my wish and desire, and I do hereby request, that a suitable and proper act of incorporation for said hospital shall be obtained from such tribunal in the state of Georgia as may have jurisdiction in the premises, to be called and known as the 'Telfair Hospital for Females,' with the ladies above named, or such of them as may consent to serve, and such others as they may apply for to be associated with them as the first trustees, managers or directresses, under said act of incorporation, with power to fill any vacancies that occur in their number. And for the purpose of accomplishing the objects contemplated in this item or clause of my will, I do hereby authorize and empower my executors, or the survivor of them, to sell and convey all, or any portion, of the real estate, or any interest in the same, which I may have, or be entitled to, and not given or devised in any of the previous items or clauses of this my will, using their discretion as to private or public sales, and to whether, and at what time, such sales shall be made."

This is an important item in consequence of the amount supposed to be given for the object indicated therein. It is devoted to the building and endowment of a hospital for sick and indigent females within the city of Savannah. It is objected to for uncertainty as to the objects; for uncertainty as to the time when the hospital is to be built, and when the act of incorporation is to be obtained; for the impossibility of creating such an act under the constitution and laws of Georgia, and as being in violation of the rule against perpetuities, in that it gives the property ultimately to a corporation not yet in existence.

We do not think that any of these objections can prevail.

First. As to want of certainty in its objects. Surely, when the testatrix says that the hospital is intended for females within the city of Savannah, into which sick and indigent females are to be admitted and cared for, she has

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said all that is necessary to make it a well-defined charity. It is to be a hospital; it is to be for females in Savannah; it is to be for sick and indigent females. What more could well be said to define it? Very few charities are more definite.

As to the uncertainty of the time when the hospital is to be built, and when the act of incorporation is to be obtained, no one who has read the case of *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Peters, 99, or the more recent case of *Ould v. Washington Hospital*, 95 U. S., 303, can have any doubt that the gift is good. Even if it cannot be carried out in the particular manner contemplated by the testatrix, the court can and will provide proper trustees to carry it out. This is fairly within the powers given by the Code.

But we cannot agree with the counsel for the complainants that the state of Georgia has, inadvertently or otherwise, deprived itself of the power of creating a charitable corporation. If the law authorizing the courts to grant charters is imperfect in this respect, it will, no doubt, be promptly amended when the defect is discovered. This is no greater or more remote contingency than that which intervenes in any case where a gift to charity contemplates a future act of incorporation by the legislature.

The fact that the property is directed to be ultimately conveyed to a corporation to be created, creates no perpetuity. The estate is given immediately to the executors and trustees, and the prosecution of the charity is to be carried on by them until the building shall be ready for delivery, and then handed over with the fund to support it to the corporation to be created; or, if none shall be created, to such trustees as the court may appoint. This creates no perpetuity as has been decided in the cases referred to, and many others that might be cited.

The twenty-third item which gives a thousand dollars to the first Christian church erected, or to be erected, in the village of Telfairville, in Burke county, or to such persons as may become trustees of the same, and a like sum to the Hodgson Institute, in the same village, are of the same char-

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acter precisely, so far as objected to, with the bequest in the case of *Attorney-General v. The Bishop of Chester* (Bro. Ch., 444), which was approved by Lord Eldon in *Attorney-General v. Parsons*, 8 Vesey, Jr., 186.

In our judgment, the gifts of this will must be sustained. We should not have thought it necessary to go so much into detail in examining the objections that have been raised, but for the ability and earnestness with which the several points were presented.

The bill must be dismissed with costs.

ERSKINE, District Judge, concurred.

 BRANCH, SONS & COMPANY v. THE ATLANTIC & GULF
RAILROAD COMPANY ET AL.

1. The charter of a railroad company authorized it "to have, purchase, possess, enjoy and retain lands, rents, hereditaments, tenements, goods, chattels and effects of whatsoever kind, nature or quality the same may be, and the same to sell, grant, demise, alien and dispose of." *Held*, that this authorized a purchase by the company of a railroad lying within the limits prescribed by its charter.
2. A railroad company whose charter contained the clause set out in the preceding head-note, and which was also authorized to incorporate its stock with the stock of any other company, had power to sell its railroad to any other company authorized to buy it.
3. When a railroad company has authority to purchase and does purchase a railroad lying within its chartered limits, the road so purchased becomes subject to a mortgage executed by the purchasing railroad company upon its line of road, completed and to be completed, but not to the prejudice of mortgages previously executed on the railroad so purchased.
4. The vendors of a railroad so purchased who received preferred stock in the purchasing company for the purchase price of the railroad sold, accepted interest thereon for years and generally acquiesced in the sale, are not entitled to be first paid out of the separate proceeds of the railroad sold, after the satisfaction of the separate mortgages on the same.
5. Power conferred on a railroad company to sell its road, includes the power to mortgage the same and the franchises necessary to use and enjoy it, not including, however, the franchise of being a corporation.
6. Power to borrow is implied in the creation of all business corporations.

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7. The registry of a mortgage not executed in such manner as to authorize its record in the proper office, is not of itself notice to parties subsequently dealing with the mortgaged property.
8. A deed of trust in the nature of a mortgage is technically a deed, and when executed with the formalities required by the law of Georgia, for the registration of a deed, may be properly registered, and its registry will be constructive notice to all the world.

This was a petition filed in the principal case of Jessup, Trustee, v. The Atlantic & Gulf Railroad Company et al., by Branch, Sons & Co. The petition alleged that the Atlantic & Gulf railroad company had purchased the railroad of the South Georgia & Florida railroad company, in payment for which it had issued preferred stock in its own company. The petitioners averred that they were holders of this preferred stock, and they claimed that on a sale of the railroad of the Atlantic & Gulf railroad company, including that portion thereof purchased as aforesaid, they would be entitled to priority of payment out of the proceeds of the sale of so much of the railroad as was purchased from the South Georgia & Florida railroad company; that their equities were better than those of the mortgagees of the Atlantic & Gulf railroad company. The prayer of this petition was according to this claim.

Mr. W. W. Montgomery, for petitioners.

Messrs. W. S. Chisholm, Robert Falligant, Henry R. Jackson, A. R. Lawton, and W. S. Basinger, contra.

BRADLEY, Circuit Justice. The petition sets forth certain agreements for the purchase of the South Georgia & Florida railroad by the Atlantic & Gulf railroad company, the first being dated June 19th, 1868; the second June 15th, 1869; the third September 1st, 1869; the fourth and last being dated June 8th, 1876, and being a conveyance or deed of bargain and sale for the said railroad.

A copy of one of the stock certificates is appended to the petition and is in the regular form of a certificate of stock drawing interest; it is headed \$6,600, No. 250, 66 shares Atlantic & Gulf railroad of Georgia. Special guaranties, seven per cent stock, issued under a contract with the South

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Georgia & Florida railroad company, bearing date January 2, 1869, for the construction of the South Georgia & Florida railroad."

It certifies that Branch & Sons or bearer is entitled to sixty-six shares, on which the par value of one hundred dollars has been paid, of the special stock of the Atlantic & Gulf railroad company, on which interest from date is perpetually guarantied at the rate of seven per cent per annum, payable semi-annually at the office of the company in Savannah, on the first days of May and November in each year. This scrip to be renewed with other like scrip when the blanks for interest on the back are filled. Witness, etc., signature of president and seal of company, and dated November 1, 1872, with indorsements of interest paid to November 1, 1874.

A similar petition was filed by W. B. Bennett. An amendment was afterwards allowed to be made to the original petition, joining the South Georgia railroad company therein, and alleging that the contract was *ultra vires* and void, and against public policy, and that neither company under its charter had any power to make such a contract. That at most it was but a lease of the road, and should be rescinded for non-compliance with its terms. But, if held a valid conveyance, still the petitioners, being *bona fide* holders of the scrip, and some of them original holders, should have the relief prayed in the original petition.

The question whether the two companies had the power to make the contract which they did depends on the condition of their respective charters at the time.

The Atlantic & Gulf railroad company was constituted by the consolidation of two companies in 1863, under an act of the legislature passed April 18, 1863. These were the Savannah, Albany & Gulf railroad company, chartered December 25th, 1847, and the Atlantic & Gulf railroad company, chartered 27th February, 1856. The consolidated company took all the immunities, franchises and privileges granted to both companies by their original charters.

The original charter of the Savannah, Albany & Gulf railroad company invested it with "all the rights, privileges

and immunities which by the laws of Georgia were held and enjoyed by any other incorporated railroad company or companies."

The original charter of the Atlantic & Gulf railroad company conferred upon it "all the privileges, immunities and exemptions granted to the Central railroad and banking company, and the Georgia railroad and banking company, or either of them, by the acts incorporating said companies and the several acts amendatory thereof."

From these provisions it results that the consolidated company had all the rights and powers granted to any other company whatever, prior to December 25, 1847, and all such as had been granted either to the Central or the Georgia railroad companies prior to February 27, 1856. It is not shown that any powers, germane to the subject under discussion, can be found in the charters referred to, going further than "to have, purchase, possess, enjoy and retain lands, rents, hereditaments, tenements, goods, chattels and effects of whatsoever kind, nature or quality the same may be, and the same to sell, grant, demise, alien or dispose of."

This enumeration of powers is sufficient to enable the companies to purchase a railroad if not precluded from doing so by the objects and purposes of its charter; but would not be sufficient, without the aid of other legislation, to enable it to purchase and possess a line of road outside of the limits prescribed to it. An inspection of the charter of the Savannah, Albany & Gulf railroad company, however, shows that the road, purchased in the present case, was not without, but precisely within, the limits of that charter. The charter gave the right to construct a railroad communication between the city of Savannah and the city of Albany, with such continuations and branches as might be requisite. Now, since it had the power to purchase, there is no reason why it should construct a new road the entire distance, if it found one to its hand for a portion of the route, which it could purchase. The South Georgia & Florida railroad company had just such a road, or charter for a road, between Thomasville and Albany, as the Savannah, Albany & Gulf

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railroad company, and the consolidated company entitled to its franchises, required, and they purchased it.

We do not see how this purchase can be regarded as *ultra vires* of the consolidated Atlantic & Gulf railroad company.

Next, as to the powers of the South Georgia & Florida railroad company to sell. This company was authorized by its charter, dated December 22, 1857, amongst other things, to construct a railroad from Albany to Thomasville, and from thence to the Florida line, about ten miles beyond Thomasville; and the company was invested with all the powers and privileges granted to the Georgia & Florida railroad company, of which it was an offshoot. The latter company, by its charter, dated January 22, 1852, had all the powers of the Savannah & Albany railroad company given to it by its original charter and amendments, not inconsistent with the rights and privileges of that company. It was further endowed with power, at any time, to incorporate its stock with the stock of any other company on such terms as might be mutually agreed upon. Now, we have seen that the Savannah & Albany company had all the power granted to any other railroad company in the state; and that the powers of the Georgia and Central companies, which were incorporated in 1833, extended to the purchase and sale of any kind of property whatever. The South Georgia & Florida railroad company, therefore, not only had the power to purchase and sell, but the still higher power of consolidating with any other company.

In view of these large grants of power, and in view of the maxim that the greater includes the less, we can have no doubt that the Atlantic & Gulf railroad company, and the South Georgia & Florida railroad company, had full powers to make the contract which is brought into question, and that the sale of the line of the latter between Thomasville and Albany was a valid sale. It included all the franchises necessary to run and operate the road.

This view of the case disposes of all those objections which are founded upon the supposed illegality of the contract as being *ultra vires* of the parties to it.

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We are further of opinion that, inasmuch as the line thus purchased by the Atlantic & Gulf railroad company was within its chartered limits, and came in place of a road which it might have constructed itself, under its own charter, that it is covered by both the first and second mortgages of that company; but, of course, not to the prejudice of the priorities due to the separate mortgages on that branch of the road.

This conclusion renders it unnecessary to consider the position of the petitioners in which they are placed by their own conduct in taking the preferred stock referred to, receiving interest thereon for long years, and generally acquiescing in the whole transaction. We think that they are entirely without equity, and the prayer of the petitioners is denied.

We may add, in this connection, that we have no doubt of the power of the Atlantic & Gulf railroad company to mortgage its road and the franchise therewith connected and necessary to run and operate the same, not including the franchise of being a corporation. If it had the power to sell, it had the power to mortgage, which is the lesser power, and included therein. This is an old doctrine, and has been confirmed by the decision of the Supreme Court of Georgia: *Wayne v. Middleton*, 2 Kelly, 383.

No express power to borrow money was necessary, for that is implied in the creation of all business corporations, although in fact express power was given to the Central railroad company in December, 1845, to borrow money on its bonds, and this power, by the terms of its charter, was, therefore, conferred upon the Savannah, Albany & Gulf railroad company, and, hence, upon the consolidated Atlantic & Gulf railroad company.

We think the mortgages are valid, and a lien upon the entire road of the company, including the portion lying between Thomasville and Albany; and that a decree should be made for the foreclosure and sale of the road, its equipments and franchises, for the purpose of raising the amount due on the mortgage bonds as prayed in the bill of complaint.

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A point, however, has been raised, which ought to be noticed here, that the first mortgage was not acknowledged or proved before the proper magistrate. The execution appears to have been made with all due solemnities, and in the proper form; but the acknowledgment was made before and certified by a justice of the Supreme Court of the state of New York. It is contended that this is not a compliance with the laws of Georgia, to authorize the recording of an instrument in the proper offices. It is admitted that it is sufficient in the case of a deed; but that a mortgage, if executed out of the state, should be acknowledged before a consul or a commissioner of the state of Georgia. This objection is extremely technical; but, if valid, we must decide that the registry of the document is not of itself notice to the parties subsequently dealing with the property. We think, however, that the objection cannot prevail. The instrument in question is not a mortgage in form, but a deed of trust; and without inquiring whether even a mortgage is not itself a deed so as to be governed by the provisions relating to deeds, we think that this document is technically a deed; and that its execution and acknowledgment in such manner and form as are required in the case of deeds, is sufficient. The objection, therefore, cannot prevail.

AT CHAMBERS, OCTOBER, 1879.

ANDERSON, STARR & CO. v. CHARLES GERDING, SURVIVING
PARTNER, ETC.

Three suits were brought in a state court by the same plaintiffs, citizens of one state, against the same defendant, a citizen of another state, on three promissory notes of the latter, all given for parts of the same consideration, and each for less than five hundred dollars, and the same defense existed to and was pleaded against all of the notes.

Held,

(1) That a verdict and judgment in one of the suits would constitute an estoppel, and be decisive of the others, and.

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(2) That, therefore, the matter in dispute, in each one of said suits, exceeded the sum or value of five hundred dollars, and that any one or all of said suits might be removed to the federal court under the act of March 3, 1875.

This was a petition for the writ of *certiorari* filed by defendant Gerding, under section seven of the act approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes" (18 Stat., 470).

The petition stated, in substance, that Anderson, Starr & Co., a firm all of whose members were citizens of the state of New York, on February 25, 1879, brought against the petitioner Gerding, who was a citizen of the state of Georgia, three several suits in the superior court of the county of Putnam, in the state of Georgia, on three several promissory notes, which purported to have been made by the firm of Gerding & Co., of which firm the petitioner was the surviving partner, and all payable to the order of the plaintiffs.

Two of the notes, on which said suits were founded, were dated May 21, 1878, and were each for the payment of three hundred and nineteen dollars, and the third was dated July 25, 1878, and was for the payment of three hundred and twenty-four dollars. One of the notes fell due November 1, 1878, another December 1, 1878, and the third December 25, 1878.

Before the term of said state court in which said suits, or either of them, could be first tried, Gerding filed in said court his petition for the removal of said three suits to this court. His petition was accompanied by a sufficient bond as required by law. The petition for removal filed in the state court, averred that the amount of money involved in said three suits exceeded, exclusive of costs, the sum of five hundred dollars; that all of said notes were made for the same consideration, and that whatever defenses could or would be made to either of said suits, could and would be made to the others, and that all of said suits involved but one controversy or matter in dispute. This petition, therefore, prayed the

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state court to consolidate said three suits, if necessary, and for an order of the court directing the removal of said suits to this court.

The petition for *certiorari* further alleged that the state court refused to comply with the prayer of the petition filed therein; refused to consolidate said causes, and refused to make an order for their removal. By an amendment to his petition for *certiorari*, the petitioner alleged that at the September term, 1879, of the state, the petitioner amended his petition for the removal of said causes, and alleged that he had filed the same identical pleas and none other to each of said suits, and, therefore, there was but one controversy embraced in the three suits.

The petition for *certiorari* further alleged that the state court, notwithstanding said amendment, and the offer by the petitioner of a new bond, still refused to make the order for the removal of said causes to this court.

The petition and amended petition prayed for the writ of *certiorari* directed to the state court, commanding it to make a return of the record in said causes.

The plaintiff, in the original action, did not deny any of the facts alleged in the petition for removal, but he resisted the removal of the suits on the ground that in neither one of said suits did the sum sued for exceed the value of five hundred dollars, exclusive of costs.

Messrs. Clifford Anderson, W. A. Reid and W. B. Wingfield, for petitioner.

Messrs. George S. Thomas, and W. F. Jenkins, contra.

Woods, Circuit Judge. The state court refused to consolidate the three causes brought against the defendant Gerding. The motion made for that purpose was addressed to the sound discretion of that court: *Lewis v. Daniel*, 45 Ga., 124.

The action of the state court on the motion cannot, therefore, be reviewed by this court.

The petition for *certiorari* is, therefore, to be considered just as if the motion to consolidate had not been made, and the question is, are the causes, or either of them, removable under

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the act of March 3, 1875. The plaintiffs and the defendant are citizens of different states. The question then is, does each one of these suits involve a controversy where the matter in dispute exceeds the sum of five hundred dollars.

In the case of *Troy v. Evans*, 97 U. S., 1, the Supreme Court held that, "*prima facie* the judgment against the defendant, in an action for money, is the measure of the jurisdiction of the United States courts in his behalf. This *prima facie* case continues until the contrary is shown, and if jurisdiction is invoked because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the required amount."

From this statement of the law, it follows that, as the matter in dispute in neither of these suits exceeds the sum or value of five hundred dollars the cases cannot be removed, unless a judgment in one of the cases would conclusively settle the others. If the judgment in one does conclusively settle the controversy in the others, then the matter in dispute, in either of the suits, may be said to exceed the sum of five hundred dollars.

The petition for removal alleged that the three notes sued on were given for the same consideration; that the defense to all three of the notes was the same, and that the three suits involved but one controversy.

It further appears, from the record, that the identical same pleas were filed by the defendant in each of the three suits—one of these pleas being *nil debet*.

The question is, therefore, will a judgment in one of these suits be conclusive in the others. If it will, the amount in dispute will be sufficient to give this court jurisdiction, and authorize the removal of the cases, if otherwise, the cases cannot be removed.

The rule of law upon this point is thus laid down by the Supreme Court in the case of *Cromwell v. County of Sac*, 94 U. S., 351:

"Where the second action between the same parties is

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upon a different claim or demand, the judgment in a prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising upon a suit in a different cause of action, the inquiry must always be as to the point or questions actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

So in *Stinson v. Dousman*, 20 How., 461, it was held that though the suit be for less than the amount necessary to give the court jurisdiction, yet if it is connected with a claim to property, and the effect of the judgment would adjust the legal and equitable claims of the parties thereto, and the value of the property exceeds two thousand dollars, jurisdiction will be maintained. See also *Rake v. Pope*, 7 Ala., 161.

Applying the rule thus laid down, if it appears that the same identical defense is made in each of the cases, that the same questions are in issue in each, then a judgment in one case will be a bar to a judgment in the others, consequently the amount in dispute in each case is not the sum sued for in that particular case, but that sum and also the sums sued for in the other cases. For one trial and judgment would decide all the cases. The petition for *certiorari* avers, and the averment is not denied, that this state of facts does exist, that there is the same defense as to all the notes, and that the three suits involve but one controversy. In each of these suits, therefore, the amount sued for in all these suits is in dispute, and that amount exceeds five hundred dollars. This court, therefore, has jurisdiction over any one of the suits, and there is no reason why any one or all should not be removed.

Let the writ of *certiorari* issue as prayed for.

NORTHERN DISTRICT OF GEORGIA.

SEPTEMBER TERM, 1876.

IN RE J. J. WILLIAMS & Co.

Where the same partners carry on the same business at different places, under different partnership names, there are not two distinct firms; the assets of both nominal firms are equally applicable to the payment of all the creditors of both.

Petition of review filed by the assignee in bankruptcy.

The facts shown by the record are as follows: James J. Williams, of Atlanta, Georgia, and R. R. Anderson, of Loudon, Tenn., composed the firm of J. J. Williams & Co., and carried on business in Atlanta, Georgia. The same persons composed the firm of Anderson & Williams, and carried on the same business in Loudon, Tennessee.

The partners, under the firm name of J. J. Williams & Co., filed their petition in bankruptcy in the district court of the United States for the northern district of Georgia, and included in their petition the firm of Anderson & Williams.

There was a fund in the hands of the assignee, and the question was presented by the petition of review, how ought these assets to be distributed?

The assignee claimed that there was in fact but one firm, and that the assets should be distributed *pro rata* between the creditors of J. J. Williams & Co. and Anderson & Williams.

On the other hand, it was claimed by the creditors of J. J. Williams & Co., that there were two distinct firms, and that the assets of each should be applied to the payment of the creditors of each.

Mr. P. L. Mynatt, for the petitioners.

No counsel opposed.

/ Jones v. Gray.

WOODS, Circuit Judge. Where parties agree to transact business jointly under a contract to share in the profits, the name or firm which they use is arbitrary and conventional. They may use the name of both or of one alone, or any distinct designation by which all of them will be bound as if all their names were used. They may trade under different firm names at different places, but it will be all one partnership: *Baring v. Crofts*, 9 Met., 380; *Gage v. Rollins*, 10 Met., 348; *St. Barbe, ex parte*, 11 Ves., Jr., 413.

To hold that where the same persons, carrying on the same business under two different firm names, the creditors holding claims nominally against one firm, are entitled to be first paid out of the assets held under that firm name, is in effect to decide that there are two partnerships, and that one of these partnerships may hold a claim against the other. But it has been held otherwise. Where all the partners are the same and they carry on the same business under different partnership names, they are the same firm, and the assets of both nominal firms are equally applicable to the payment of all the creditors: *Collyer on Part.*, secs. 1000, 1003, 1004. See also *Buckner et al. v. Calcote*, 28 Miss., 586, 587; *In re Vetterlein et al.*, 5 Benedict, 311.

On these authorities and principles I must hold that all the assets of J. J. Williams & Co. and Anderson & Williams are to be applied *pro rata* to the payment of all their creditors.

EDGAR E. JONES V. SYLVESTER GRAY.

AN unmarried man who lives (but does not keep house) in one town, and supports, by his contributions, his mother and his unmarried sister, who board with his married sister in another town, is not entitled to the exemptions allowed by the law of Georgia to the head of a family.

Petition of review.

Mr. John T. Glenn, for petitioner.

Mr. E. N. Broyles, for objecting creditor.

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WOODS, Circuit Judge. The question presented by this petition is, whether the bankrupt is entitled to the exemptions allowed by the Code of Georgia, as the head of a family.

The bankrupt, at the date of his bankruptcy, was, and now is, an unmarried man, residing in Athens, Georgia, but not keeping house there. He has a mother and an unmarried sister, twenty years of age, who are boarding with a married sister of the bankrupt, in Augusta, Georgia. The mother and unmarried sister have no means of support, and the bankrupt, since the year 1872, has supported them by his contributions, but it does not appear that they are unable to maintain themselves by labor.

Under this state of facts, can the bankrupt be called the head of a family? We think not. The Supreme Court of Georgia has given a very liberal construction to the phrase, "head of a family."

In *Marsh v. Lazenby*, 41 Ga., 153, it was held that "an unmarried man, whose indigent mother and sisters live with him, and are supported by him, is the head of a family, in the sense in which the term is used by the constitution of the state, and is entitled to a homestead."

But this definition, liberal as it is, does not include the case of the bankrupt, for the mother and sister of the bankrupt do not live with him. He, a single man, without family of his own, lives in one town, and supports, by his contributions, his mother and unmarried sister, who live in another town, and are inmates of the family of a married sister of the bankrupt. To call a man, so situated, the head of a family, is, in my opinion, unwarrantably extending the meaning of the phrase. The bankrupt and his mother and unmarried sister do not constitute a family; the bankrupt cannot, therefore, be the head of a family, for "a family is a collective body of persons, who live in one house, and under one head or manager:" Webster's Dictionary.

I agree in opinion with the district court, that the bankrupt is not the head of a family, and is not, therefore, entitled to the exemptions allowed the head of a family.

THE STATE OF GEORGIA v. O'GRADY.

1. Under section 643 of the Revised Statutes, providing for the removal of criminal cases from a state to a federal court, the prosecution is not commenced until the finding of an indictment.
2. Upon the trial of a case, removed under said section, the right of the parties to challenge jurors is regulated by the law of the United States.
3. Upon the trial of an indictment for murder, removed to the federal court, under said section, the accused is called to answer to the offense as defined by the laws of the state.
4. A United States soldier, when acting as a part of the posse of a United States marshal or revenue officer, is as much bound to obey the laws of the United States as any other citizen, and he has the same rights of self-defense, and no other.

Trial of an indictment for murder, before Woods and ERSKINE, JJ.

In January, 1876, three United States soldiers, belonging to the garrison in Atlanta, Ga., were arrested in Gilmer county, Ga., under state process, for the alleged murder of one John Emory, a citizen of that county. After examination by the magistrates, they were committed to prison to await trial.

They then petitioned the circuit court of the United States, for the northern district of Georgia, the district which includes Gilmer county, for the removal of the cause into that court by the writ of *habeas corpus cum causa*, under the provisions of section 643 of the Revised Statutes of the United States, alleging that the prosecution was for acts done by them while acting under a revenue officer of the United States, and on account of a right claimed by them under the revenue laws. The court not being in session, the petition was presented to the clerk, who issued the writ. This was served, and the marshal took the prisoners into custody and took them before the United States district judge.

On motion of the attorney-general of Georgia, Judge Erskine, after argument, directed the marshal to return the prisoners to the state officers, holding that the prosecution

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was not commenced, in the meaning of that section of the Revised Statutes, until the finding of an indictment.

At the next term of the superior court of Gilmer county, in May, 1876, an indictment was found against the three prisoners for the crime of murder, charging one of them, O'Grady, as principal in the first degree, and the two others, Wells and Newman, as principals in the second degree, as accessories before the fact and as accessories after the fact.

The prisoners then petitioned anew for the removal of the cause into the United States Circuit Court, and for the writ of *habeas corpus cum causa*. The circuit court was not in session, and therefore the petition was presented to its clerk and filed in his office. He issued the writ, and it was promptly served on the clerk of Gilmer superior court by the marshal. The prisoners then moved that court for two orders—one directing the clerk to certify and send the record to the circuit court; the other, that the sheriff should deliver the prisoners to the United States marshal. The court, after careful examination of the writ, became satisfied that it conformed to the act of congress, and granted the orders. The marshal took the prisoners to Atlanta, and applied for the direction of Judge Erskine, who ordered that they should be held in prison, by the marshal, for trial at the next term of the circuit court, but permitted Wells and Newman to be released, if they should tender sufficient bail, in an amount fixed by him, a state judge having previously pronounced their offense to be bailable.

At the next term of the circuit court, Woods, circuit judge, and Erskine, district judge, sitting, the prisoners were arraigned and pleaded not guilty, and claiming the right to be tried separately, O'Grady was put on trial.

The question arose, whether the parties should respectively have the number of challenges of jurors allowed by the law of Georgia, or the number allowed in cases of the same class by the law of the United States. The court decided that in this matter the law of the United States was applicable, and, accordingly, allowed the prosecution five peremptory chal-

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lenges, and to the defense twenty, as provided in section 819 of the Revised Statutes.

The evidence showed that the three soldiers belonged to a detachment that had been sent from the garrison in Atlanta, to aid the deputy collector of internal revenue, and the deputy marshal of the United States, in executing the law in the mountain regions of Georgia. That country is distant from markets for its farm products, and therefore presents temptations to the conversion of corn into so portable a form as whisky, and abounds in obscure recesses where small distilleries can be run without much danger of general observation. The inhabitants have long been accustomed to make whisky without license or tax. The revenue law is odious to them, and they have the reputation of being ready to do violence in resisting the enforcement of it.

The three soldiers were detailed from the camp by the lieutenant commanding, to go with the deputy collector and deputy marshal on a nocturnal expedition to a neighborhood in which illicit distilleries were reported to be carried on. When they were leaving the camp their commander told them to beware of surprise. On the way they were informed by citizens that the neighborhood was dangerous, and that their party was too small. After midnight, they found an illicit distillery in operation on the premises of Emory, the deceased; took possession of it, and arrested four persons whom they found inside. Wells, who was a sergeant, went off in search of a wagon belonging to the party, leaving Newman and O'Grady to guard the prisoners and the distillery, having placed Newman inside, with the four prisoners, and O'Grady outside, as a sentinel, with a caution to O'Grady to challenge all comers, and to be on the alert against surprises. Soon after he left, the prisoners made some movement which Newman took as hostile, and he threatened them in rather rough language, audible to O'Grady.

Emory, the proprietor, knew nothing of all this, but was sleeping in his house a few rods distant, when a friend came, waked him, and gave him information that the revenue officers were in the neighborhood. Not suspecting that they

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were so near, he ran from the house toward the distillery, shouting to his friends there to escape. About the time that he would have reached the distillery, O'Grady fired his musket, and nothing more was seen of Emory that night by any witness. There was a conflict of testimony on the point, whether O'Grady challenged before firing, Newman, testifying that he heard the challenge, and the prisoners in the still-house testifying that they did not hear it. Wells and others of the revenue party soon came with the wagon, and they all left the premises, carrying away the prisoners and the still. The next morning Emory was found dead in a small water-course near the distillery, with a fatal bullet wound in his head, and blood was traced from a spot near the distillery to the brink of the stream.

Mr. N. J. Hammond, Attorney-General of Georgia, for the prosecution.

Messrs. A. T. Ackerman, H. P. Farrow, United States Attorney, and *George S. Thomas, Assistant United States Attorney*, for the defense.

The following is the substance of the charge of the court, delivered by Woods, circuit judge:

Though this case is tried in a court of the United States, it is to be determined by the law of Georgia, and you are to decide whether, under the law, O'Grady is guilty or not of the crime of murder, with which the indictment charges him. Murder is defined by the Code of Georgia as 'the unlawful killing of a human being, in the peace of the state, by a person of sound memory and discretion, with malice aforethought, either express or implied.' Attention has been called in the argument of counsel to another species of homicide—manslaughter, which is defined in the same Code as 'the unlawful killing of a human creature, without malice, either express or implied, and without any mixture of deliberation whatever,' etc. We are of the opinion that if the facts in proof in this case show any crime, it is murder, and not manslaughter, and therefore you may dismiss the question of manslaughter from your consideration.

The defendant comes to this bar, like every other person charged with crime, presumed to be innocent until his guilt.

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is proved, and the proof is insufficient for conviction, unless it excludes all reasonable doubt. It is conceded that the deceased was killed by the prisoner. This fact, without explanation, would make out a case of murder, and if no explanation were offered, it would be your duty to return a verdict of guilty. But the fact of the homicide is open to explanation. The defense undertakes the explanation, and justifies the killing on the ground of self-defense. It insists that O'Grady, situated as he was at the time, had reasonable cause to believe, and did believe, that deceased was approaching him with a hostile and felonious intent, and that, in consequence thereof, he stood in peril of his life, or of great bodily harm. If the evidence satisfies you that this view is correct, you should acquit the prisoner. To form a right judgment upon this defense, you should put yourselves in his place at the time, and look at the facts, not as they appear by the light of subsequent disclosures, but as they then appeared to him.

His counsel relies on facts which he insists are proved, that the neighborhood had a reputation for violence towards those in the revenue service; that there was a supposed necessity of protecting and aiding them with military force; that it was night; that the prisoner was unacquainted with the ground; that his officers had warned him to be watchful against surprise; that the sergeant had ordered him to challenge every one who might come near; that he and his comrade were guarding four prisoners, who, if reinforced, might easily overpower them, and who had manifested a hostile disposition; and that deceased came running and shouting in a manner that might well be taken for a bold assault, and did not halt when challenged, and argues that there was enough to excite the fears of a reasonable man, and to justify him in repelling the apprehended violence with a shot. You will consider all these facts, so far as they have been proved, and allow them due weight in support of the defense. The Code of Georgia justifies a homicide committed in defense of one's person 'against one who manifestly intends, or endeavors, by violence or surprise, to commit a felony on the per-

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son ;' but it also declares that a bare fear of such an offense shall not justify the killing. 'It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing really acted under the influence of those fears.'

The defendant derives no protection from the fact that he was a soldier. It was a time of peace, and a soldier was as much bound as a citizen to respect the laws of the state. He was there as a part of the posse of the revenue officer and of the marshal, and had the same, and only the same, rights of self-defense that a citizen would have had under the same circumstances. Even if he had been ordered by his military commander to fire the fatal shot, that order, unless in itself lawful, would be no protection to him, for a soldier has no right to obey an unlawful order.

Nor can the accused derive any protection from the fact, if it be a fact, that the deceased was engaged in the habitual violation of the revenue laws of the United States. By violating the revenue laws the deceased did not forfeit his life. He was still under the protection of the law. The killing of him unnecessarily, wantonly and willfully, by a revenue officer, or any of his posse, would be as clearly murder as the killing of the most law-abiding citizen of the land.

It is not denied that the accused was lawfully on the spot, or that it was his duty to prevent the rescue or escape of the prisoners, but if, under the pretense of performing that duty, he fired on the deceased unnecessarily, wantonly and willfully, the law holds the act to be with malice; and if you find that such were the facts of this case, your verdict should be guilty. But if, on the other hand, the evidence satisfies you that the accused had reasonable cause to believe, and did believe at the time he fired the fatal shot, that in consequence of the hostile approach of the deceased he was placed in peril of life or limb, and by reason of such supposed peril he fired upon the deceased, in that case it would be your duty to return a verdict of not guilty.

Under this charge the jury retired, and soon brought in a verdict of not guilty. The counsel for the prosecution then entered a *nolle prosequi* as to the defendants Wells and Newman.

In the Matter of a Rule of Court.

MARCH TERM, 1877.

**IN THE MATTER OF A RULE OF COURT PRESCRIBING THE DUTY OF
CIRCUIT COURT COMMISSIONERS IN CERTAIN CASES.**

1. An affidavit made solely upon information derived from others whose names are not given, by a person who swears that he has good reason to believe, and does believe, that a certain person, naming him, has committed an offense against the laws, describing it, does not meet the requirements of article four of the amendments to the constitution of the United States.
2. The probable cause mentioned in that article which is to be supported by oath or affirmation, and upon which alone a warrant can issue, must be submitted to the committing magistrate, who must judge of the sufficiency of the ground shown for believing the accused party guilty.
3. The magistrate, before issuing a warrant, should have before him the oath of the real accuser to the facts on which the charge is based, and on which the belief or suspicion of guilt is founded.

BRADLEY, Circuit Justice. I am informed by his honor, the district judge, that great inconvenience is caused in this district by the arrest of persons charged with offenses against the revenue laws, against whom no sufficient evidence can be produced, either before the grand jury to warrant an indictment, or before the traverse jury to justify a conviction, whereby much useless expense is caused to the government, and the personal liberty of the people is unnecessarily interfered with. One cause of this evil seems to be the fact that warrants are issued upon the affidavit of some officer, who, upon the relation of others whose names are not disclosed, swears that, upon information, he has reason to believe, and does believe, the person charged has committed the offense charged. The district judge, not being satisfied that this is a sufficient ground for issuing a warrant of arrest, has desired my advice in the matter. After examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the constitution, which, by the fourth article of the amendments, declares that the right of

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the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and that no warrants shall issue but upon probable cause, supported by oath or affirmation, describing the place to be searched and the persons to be seized. It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based and on which the belief or suspicion of guilt is founded. The magistrate can then judge for himself, and not trust to the judgment of another, whether sufficient and probable cause exists for issuing a warrant.

It is possible that by exercising this degree of caution, some guilty persons may escape public prosecution, but it is better that some guilty ones should escape than that many innocent persons should be subjected to the expense and disgrace attendant upon being arrested upon a criminal charge, and this was undoubtedly the beneficent reason upon which the constitutional provision referred to was founded.

In view of these considerations, and to correct the evil alluded to, we have prepared and now make the following general order for the guidance of the commissioners of this court, in the manner of issuing warrants of arrest against persons charged with crime, to wit:

No warrant shall be issued by any commissioner of this court for the seizure or arrest of any person charged with a crime or offense against the laws of the United States upon mere belief, or suspicion of the person making such charge;

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but only upon probable cause, supported by oath or affirmation of such person, in which shall be stated the facts within his own knowledge constituting the grounds for such a belief or suspicion.

SEPTEMBER TERM, 1877.

FINDLEY V. SATTERFIELD.

1. Section 648, Revised Statutes, in so far as it provides for the removal to the United States circuit court of prosecutions against federal revenue officers in the state courts, is a constitutional enactment.
2. The provisions of said section apply to every case of a federal revenue officer indicted in a state court for an act done under color of the United States revenue laws, but charged to be in violation of the criminal law of the state, and are not restricted to cases where an attempt is made by a state legislature to nullify a law of the United States.

HABEAS CORPUS. Before WOODS and ERSKINE, JJ.

Findley, Gaston and Prater were indicted in the superior court of Lumpkin county, Georgia, for the offense of assault with intent to murder, charged to have been committed on one Thomas, and were arrested to answer the indictment. The facts of the assault, as they alleged, were that Findley, a deputy collector of the internal revenue of the United States, and his assistants, Gaston and Prater, were going to a small distillery that was running illicitly, for the purpose of seizing the still. Discovering their approach, the distillers and their friends, of whom Thomas was one, took the still and made off with it, and were pursued by the revenue party. Thomas aimed his gun at one of the pursuers, and seemed about to shoot, when one of the pursuers shot a pistol and wounded him, and on this shooting the indictment was founded.

Upon these facts the prisoners petitioned the circuit court of the United States for the northern district of Georgia—the district in which Lumpkin county lies—for the removal

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of the prosecution into that court, and the writ of *habeas corpus cum causa* was duly issued under section 643 of the Revised Statutes of the United States, and was served on the superior court of Lumpkin county. The judge of that court disregarded it, and directed the sheriff to retain the accused in prison. The prisoners then petitioned the circuit court for the writ of *habeas corpus* directed to Satterfield, the sheriff, alleging that they were held in custody by him in violation of the law of the United States. The writ was issued and served. Satterfield produced the prisoners before the circuit court, and returned that he held them under the authority of the superior court of Lumpkin county, as above set forth.

Mr. A. T. Akerman, for petitioners.

Mr. R. N. Ely, Attorney-General of Georgia, for respondent.

Woods, Circuit Judge. The petitioners do not deny that it was lawful for the sheriff to arrest them, and to hold them until the writ of *habeas corpus cum causa* was served on the superior court of Lumpkin county. But they say that, under the laws of the United States, the effect of that writ, when served, was to remove the indictment, and with it the lawful custody of their persons from that court to this; and that, therefore, the holding of them since by the officer of that court, the sheriff, has been in violation of the law of the United States. On the other hand, the attorney-general of Georgia, for the respondent, contends that the jurisdiction of Lumpkin superior court over the prosecution, and the attendant right of that court to hold the prisoners for trial, have not been displaced by the proceedings which have been had for removal, because, first, the act of congress which is supposed to authorize those proceedings is not warranted by the constitution of the United States; and, second, that the act, even if constitutional, is not applicable to such cases as the present. He concedes that if the act is constitutional, and is applicable to this case, the custody of the prisoners belongs here, and the sheriff has no right to hold them.

The first question, then, for our consideration, is whether

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congress has constitutional power to remove from the state courts into the United States courts for trial there, criminal prosecutions under the state laws commenced in the state courts, against persons executing the revenue laws of the United States, for acts done under color of those laws, or on account of rights claimed by such persons under those laws, and to prohibit the state courts from proceeding further with such prosecutions after the prescribed steps for removal have been taken.

If a question of this kind can be settled by the practice of the government, and by the authority of eminent men, the answer must be in the affirmative. The history of the legislation in which congress has undertaken to exercise this power has been brought to our notice. We find that the temporary act of February 4, 1815, approved by President Madison (3 U. S. Statutes, 195) contained, in section eight, provisions similar to those of section 643 of the Revised Statutes. In January, 1833, President Jackson recommended that congress should re-enact the law of 1815, with some amendments, and accordingly the act of March 3, 1833, was passed (4 U. S. Statutes, 632), section three of which is repeated in section 643 of the Revised Statutes. This act was passed under circumstances which drew upon it the serious attention of the country, and caused its provisions to be thoroughly considered. The material part of the third section received its final shape from an amendment proposed in the senate by that wise and learned jurist, Thomas Ewing, of Ohio. The test vote upon the bill in the senate was thirty-two yeas to eight nays, and the vote in the house of representatives was one hundred and twenty-six yeas to thirty-four nays. Among the yeas were John Quincy Adams, James K. Polk, John M. Clayton, George M. Dallas, Thomas Ewing, John Forsyth, Theodore Frelinghuysen, Felix Grundy, William C. Rives, Peleg Sprague, Daniel Webster, Hugh L. White, William Wilkins, John Bell, Edward Everett, Richard M. Johnson and the name, ever to be revered in this court, of James M. Wayne, with others of scarcely less note, representing different parts of the country and different political parties. Presi-

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dent Jackson approved the bill, his legal adviser at the time being Roger B. Taney. This act remained in force until superseded by the Revised Statutes in 1874. As it was held to apply only to the customs revenue, section 67 of the act of July 11, 1866, approved by President Johnson, extended its provisions to the internal revenue: 14 U. S. Statutes, 98.

We should not feel at liberty to pronounce unconstitutional a course of legislation so long continued, so deliberately maintained—sanctioned by so many venerated names and by the general approbation of the country, unless its unconstitutionality was made very clear to our minds; and, aside from this weight of authority, our reflections have brought us to the opinion that these statutes are fully warranted by the fundamental law.

The judicial power extends to all cases arising under the laws of the United States. It is argued that no criminal case can arise under those laws, except when a person is accused of violating them. But we think that, when an officer, executing in a lawful manner a law of the United States, meets with resistance, and, to overcome that resistance, uses necessary force, and, for such use of force, is charged with crime against the state, the case arises under the law of the United States. To hold that a case arises under that law, when it forbids the act under investigation, but does not arise under that law when it produces and justifies the act under investigation, is to take the words of the constitution in a sense too partial and limited. Congress can give criminal jurisdiction to the courts of the United States, when the law of the United States is the ground of defense, as well as when it is the ground of accusation.

Congress has power to levy and collect taxes and excises, and to make all laws necessary and proper to carry that power into execution. This includes the power to employ suitable officers and agents, and to protect them from accountability in the state courts for acts done, or in good faith alleged to have been done, in the course of their duty. We can not say that this protection is not necessary and proper for the prompt and effective collection of the revenue. It is obvious

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that, where a local sentiment, adverse to a particular revenue law, could exert itself in irremovable prosecutions in the local courts against persons executing that law, the collection of the revenue might be seriously impeded. Congress has thought proper to guard against such impediments by the law that we are now considering, and we are satisfied that it is a constitutional means to a constitutional end.

We do not overlook the objection that no tribunals but those of the state can try for crime against the state. This objection does not appear to us well founded. To try, is to ascertain by a jury whether a criminal law of the state has been violated. In civil cases, congress has directed the courts of the United States to apply the law of the state, and they do it daily. In the criminal cases under consideration, congress has directed the circuit courts to apply the law of the state, and we do not see why they may not do it as well as in cases of the other class. To learn what is the criminal law of the state is no more difficult than to learn what is its civil law. Juries are, in the courts of the United States, composed of the citizens of the state, of the same qualifications as jurors in the state courts, and selected by similar rules. The courts of the United States ascertain facts by evidence substantially the same as that received in the state courts, and have the like aid of counsel for the prosecution and for the defense. In case of conviction, the accused could not decently object to a jurisdiction to which he had himself appealed. If any difficulty should arise in executing a sentence, congress could provide against its recurrence by further legislation; but, until such a difficulty shall occur in practice, we need not apprehend one.

We would not suffer the right of removal to be abused. We shall enforce it only when it has been claimed in good faith and on good grounds. Should we discover, either before or during trial, that the facts of a case did not bring it within the act of congress, we should proceed no further with it, and should remand it to the state court.

But suppose that the circuit court can not try such cases, it would not follow that congress could not deliver the pris-

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oners from the custody of the state court, and stay proceedings there. The power to do this is distinct from the power to give the courts of the United States a jurisdiction for trial.

A notable instance of the exercise of such a power by congress is found in the act of August 29, 1842, 5 U. S. Statutes, 539, re-enacted in the Revised Statutes, section 762, empowering the judges of the United States to deliver, by the writ of *habeas corpus*, foreigners confined by the state courts for acts done under the authority of foreign powers. The confinement and trials of such prisoners by the state court for such offenses was deemed by congress incompatible with the international obligations of the United States, and accordingly provision was made for discharging them by *habeas corpus*. This act was drafted by Mr. Webster and was introduced and advocated in the senate by Mr. Berrien, and though it did not escape criticism at the time, we believe that the intelligent minds of the country now approve of it.

If a prisoner can be delivered from the custody of the state courts by *habeas corpus*, in order that the government may be unembarrassed in its international duties, he can be similarly delivered when congress so provides in order that the government may be unembarrassed in the collection of its revenue. If the law of the United States and the law of the state can not both be executed, the latter must give way. But in the case now before us, we think that the state law can be executed, though not by the state tribunals.

The present case falls within the letter of section 643. It is argued that this section applies only to cases of attempts by state legislatures to nullify a law of the United States. It is not so limited in its terms. Indeed, the act of 1866 was passed when no such attempt existed or was apprehended. We, therefore, think that the law is applicable to this case.

It is, therefore, adjudged that the detention of the petitioners by the sheriff is in violation of the law of the United States, and it is ordered that the marshal hold them in custody, subject to the further order of this court, for trial under the indictment found against them by the superior court of Lumpkin county.

ERSKINE, District Judge, concurred.

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MARCH TERM, 1878.

THE UNITED STATES v. E. P. FEARS.

1. A person may be guilty, under section 3177, Revised Statutes, of the offense of obstructing and hindering an officer of internal revenue in the exercise of his authority, to enter any building or place where articles subject to tax are produced, for the purpose of examining such articles, although such person does not own the building or the articles subject to tax, and did not make, produce or keep them.
2. It is no offense to resist or obstruct an officer who is acting without authority, or who is exceeding his authority.
3. The right of resistance to illegal official action is essential, not merely to all free government, but to any government whatever.
4. Under section 3177, Revised Statutes, a collector, deputy collector or inspector of internal revenue, may, without process, enter any building where distilled spirits, subject to tax, are produced or kept, so far as may be necessary for examining the same, and under section 3453, Revised Statutes, may, without process, seize illicit distilled spirits.
5. An indictment, under section 3177, for hindering an internal revenue officer, without warrant, from entering a building where illicit distilled spirits, subject to tax, were kept, and from seizing said spirits, must aver that the attempt of the officer to enter, which was hindered, was made in the day time, or that it was made in the night season when the premises were open, and that such entry was necessary for the purpose of examining such distilled spirits, and that they were in the custody of some person who had the purpose of selling or removing the same, in fraud of the internal revenue laws, or the design to avoid the payment of the taxes thereon.

Heard on demurrer to the indictment.

The indictment in this case was based on the last clause of section 3177, U. S. Revised Statutes. The entire section reads as follows :

“Any collector, deputy collector or inspector may enter in the day time any building or place where any articles or objects subject to tax are made, produced or kept within his district, so far as it may be necessary for the purpose of examining said articles or objects. And any owner of such building or place, or person having the agency or superin-

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tendence of the same, who refuses to admit such officer, or to suffer him to examine such article or articles, shall, for every such refusal, forfeit five hundred dollars. And when such premises are open at night, such officers may enter them while so open in the performance of their official duties. And if any person shall forcibly obstruct or hinder any collector or deputy collector, or inspector in the execution of any powers vested in him by law, or shall forcibly rescue, or cause to be rescued, any property, articles or objects after the same shall have been seized by him, or shall attempt or endeavor so to do, the person so offending, excepting in cases otherwise provided for, shall, for every such offense, forfeit and pay the sum of five hundred dollars, or double the value of the property so rescued, or be imprisoned for a term not exceeding two years, at the discretion of the court."

The indictment charged that the defendant did "forcibly obstruct and hinder one William W. Brown in the execution of a power and authority vested in him, the said William W. Brown, by law, to search for and seize two packages of corn whisky, containing, in the aggregate, sixty gallons, said two packages of corn whisky then being distilled spirits, subject to tax, on which the tax had not been paid, said distilled spirits having been removed from the place of distillation to a place other than the distillery warehouse provided by law, said two packages of distilled spirits being then and there supposed to be kept concealed in the smoke-house of him, the said E. P. Fears, then and there being; he, the said William W. Brown, being then and there a deputy collector of internal revenue for the second collection district of Georgia, in the execution of a power and authority vested in him by law, to search for and seize said two packages of distilled spirits, wherever found, and to enter said smoke-house, so far as it was then and there necessary, for the purpose of making such search and seizure."

The demurrer to this indictment was based on two grounds:

1. Because it was not averred that the defendant, E. P. Fears, concealed the said distilled spirits

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2. Because the authority under which the officer acted was not sufficiently set out.

Mr. H. P. Farrow, U. S. Attorney, for the United States.

Mr. S. A. Darnell, for defendant.

WOODS, Circuit Judge. The first ground of demurrer is clearly untenable. The offense charged is not the removal, nor concealment, nor keeping of distilled spirits contrary to law, but the obstructing of an internal revenue officer in the discharge of his duty. The distilled spirits may be kept by one person in his own building, and yet another person may obstruct or hinder the officer when he attempts to enter such building for the purpose of examining the spirits. The latter would clearly be amenable to the law, though he owned neither the building nor the spirits, and did not make, produce or keep them. To keep or conceal illicit spirits is one offense, to obstruct or hinder an officer from entering a building where illicit spirits are kept, is a distinct and different one. It is the latter which the pleader has attempted to charge in this indictment.

The second ground of demurrer is, we think, well taken. An indictment for obstructing or hindering an officer should show the authority under which the officer is acting.

It is no offense to resist or obstruct an officer who is acting without authority or who is exceeding his authority. The pleader seems to have known the rule, and has made an attempt to conform to it. In this, we think, he has failed.

There is no pretense that the officer was acting by virtue of any search-warrant or any other legal process. The theory of the prosecution seems to be that, under section 3177 of the Revised Statutes, the internal revenue officer may enter without process any building where distilled spirits subject to tax are made, produced or kept, so far as it may be necessary for examining the same; and that under section 3453, he may also, without process, seize illicit distilled spirits. This is true, but the authority exists only where the circumstances prescribed by these sections exist. The officer has the authority in the case pointed out by the statute, and in no other.

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To show his authority, it must appear that such a state of facts existed as are contemplated by the statute.

By section 3177 the internal revenue officers are authorized in the day time or in the night, when the premises are open, to enter any building where any articles subject to tax are made, produced or kept, so far as it may be necessary for the purpose of examining said articles.

There is no averment in the indictment that the attempt to enter the smoke-house of the defendant and examine said distilled spirits was made in the day time, or made at night when the premises were open, nor that said distilled spirits were made, produced or kept on said premises, or that such entry was necessary for the purpose of examining said spirits.

It does not appear, therefore, from the indictment, that the officer had authority to make a search or to enter the premises of defendant; and it does not appear that it was unlawful for the defendant to resist the officer in making such entry and search. If, for instance, the officer had attempted to enter the premises in the night season, when the door was shut, the defendant would have had the right to resist him, and would violate no law in so doing.

Section 3453, Revised Statutes, authorizes the seizure of taxable articles by the internal revenue officers "which shall be found in the possession or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with the design to avoid the payment of the taxes thereon."

There is no averment in the indictment that the distilled spirits therein mentioned were in the custody of any one for any of the purposes mentioned in the section just quoted. The authority of the revenue officers to seize is, therefore, not averred, and it does not appear from the indictment that the defendant was guilty of any offense in obstructing or hindering such seizure.

As to both the attempted examination and seizure, from all that appears in the indictment the officer seems to have been a trespasser who might be lawfully obstructed and resisted.

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The right of resistance to illegal official action is essential, not merely to all free government, but to any government whatsoever. All citizens of the United States are guaranteed by the constitution security in their persons, houses, papers and effects, against unreasonable searches and seizures. The right to resist an unauthorized search or seizure is a direct consequence of this guaranty. In order, therefore, to show that defendant was guilty of an offense in resisting the search and seizure of the revenue officer, the authority of the latter should have been set out. This the indictment entirely fails to do. It is, therefore, defective and bad, and the demurrer must be sustained.

ERSKINE, J., concurred.

**JAMES C. WARNER ET AL. V. THE RISING FAWN IRON
COMPANY.**

1. A mortgage to secure an issue of bonds provided that, after a default continuing for six months, in the payment of the interest coupons attached to the bonds, the trustees named in the mortgage might, upon the request of any holder of bonds, take possession of the mortgaged property and advertise and sell the same to pay the bonds and coupons. A bill having been filed to foreclose the mortgage: *held*, that the fact that the condition existed which authorized the trustees to take possession of the mortgaged property, and the refusal of the trustees to take possession, were sufficient grounds for the appointment of a receiver.
2. Pledges of bonds payable to bearer, hypothecated to secure a debt, are legal holders, and are entitled to demand payment of coupons which fall due before the maturity of the debt which the bonds were pledged to secure.
3. Generally suit may be brought on any commercial paper payable at a particular place without a previous demand at that place.
4. Bonds, payable to bearer, issued by an incorporated company, contained the following provision in relation to the payment of interest, viz.: "With interest at the rate of ten per cent per annum, payable semi-annually on the first days of January and July in each year, on the presentation of the respective coupons hereto attached, both principal and interest payable at the principal office of said company in the city of New York." *Held*, that under this form of bond the coupons might be sued without previous presentation for payment.

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IN EQUITY. Heard upon motion to continue receiver and injunction.

During the vacation of the circuit court, to wit, on January 26, 1878, Judge Erskine, the district judge, on the application of complainants, and after due notice to defendants and argument of counsel, directed an injunction to issue restraining the defendants, their agents and attorneys, from interfering with or controlling the property described in the deed of trust, to foreclose which the suit was brought. He also appointed a receiver to take possession of the trust property and preserve and manage the same under the direction of the court.

During the regular term of court following, beginning on the second Monday of March, the complainants moved that the injunction allowed by the district judge, and his order appointing a receiver, be continued.

This motion, which was strenuously resisted by the defendants, was, by consent of parties, continued until June, 1878, and the motion was then heard and argued upon the showing made on the original hearing and upon additional affidavits introduced by both parties.

The bill was filed by complainants as holders of first mortgage bonds to the amount of \$88,000, issued by the defendant, the Rising Fawn Iron Company, and secured by a first mortgage upon all its property, situated in Dade county, Georgia, consisting of lands, a blast furnace erected thereon, and all the property, whether real or personal, used by the company in Dade county, Georgia, in the manufacture of iron and in carrying on that business.

The bonds were issued and the trust deed to secure them executed by authority of an act of the legislature of Georgia, approved February 2, 1876, entitled "An act to amend the charter of the Rising Fawn Iron Company," etc.: Laws of Georgia, 1876, page 248.

This act authorized the company, on a vote of a majority of the stock, to execute its first mortgage bonds for any sum not exceeding \$125,000, one hundred of said bonds to be for the sum of \$1,000 each, and fifty for the sum of \$500 each;

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all to fall due in five years, and bear a rate of interest not exceeding ten per cent per annum, "payable semi-annually on the first days of January and July, for which interest coupons shall be attached to said bonds specifying the amount of interest due on each and the date of its payment." The act further authorized the company to execute a deed of trust on all its property, real and personal, in Dade county, Georgia, used in carrying on its business and in manufacturing pig iron, to secure the principal and interest of said bonds, and the act declared, "in case the coupons due on said first mortgage bonds shall at any time remain unpaid for the space of six months, the principal of said first mortgage bonds shall then become due on account of the failure to pay said coupons, and it shall be the duty of the trustees mentioned in said trust-deed, within sixty days after said default, to pay the interest due as aforesaid," to advertise and sell the property conveyed by said deed of trust, and to convey the same to the purchaser and to apply the proceeds to the payment first of said first mortgage bonds and coupons.

The act further provided that when said deed of trust was recorded in the proper office, the bonds and coupons secured thereby should be "the first lien prior and superior to all others on all the property included in said trust deed."

The trust deed was drafted in substantial conformity with the statute.

The bonds declared that they were "payable on the first day of March, 1881, with interest at the rate of ten per cent per annum, payable semi-annually on the first days of January and July in each year, on presentation of the respective coupons hereto attached, both principal and interest being payable at the financial office of said company in the city of New York." The bonds further declared: "Should the coupons due on said first mortgage bonds remain unpaid after becoming due for the space of six months, the principal of said first mortgage bonds shall then become due."

The deed of trust also declared: "And in case said party of the first part shall, for the space of six months, make default in the payment of the semi-annual interest to become

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due upon said mortgage bonds, then after the expiration of said six months from the time it becomes due, the whole principal sum mentioned in each and all of said mortgage bonds, then outstanding, shall then forthwith become due and payable, and the lien or incumbrance hereby created for the security and payment thereof, may at once be enforced as hereinafter provided. And it is agreed, in case of the default of the payment of the semi-annual interest for six months, as above provided, that said trustees or their successors are hereby expressly authorized and empowered, upon the request of the owners or holders of said bonds, or any of them, to enter into and upon and take actual possession of all the property, real and personal, hereby conveyed, and each and every part thereof, within sixty days after said default of six months to pay said interest coupons, and to advertise and sell said property," etc., and make a deed therefor to the purchaser.

The deed of trust further declared as follows: "The conveyance hereby effected is subject to the possession and management of said property by said party of the first part (the Rising Fawn Iron Company), its successors and assigns, so long as no default shall be made in the payment of the principal or interest of said bonds or either of them, and so long as said party of the first part shall well and truly keep, observe and perform all the covenants, agreements, conditions and stipulations of said bonds," etc.

The company issued one hundred bonds of \$1,000 each, and fifty bonds of \$500 each, all secured by the deed of trust.

The complainants claimed to be the holders of \$88,000 of said first mortgage bonds; that of the bonds for \$1,000 each they held those numbered from one to fifty-two, both numbers inclusive; number fifty-six; numbers from sixty-three to sixty-seven, both inclusive; numbers from seventy-two to seventy-eight, both inclusive; number eighty-three; and numbers ninety-five, ninety-six and ninety-seven; and of the bonds of the denomination of \$500 they held all numbered from one to thirty, both inclusive, except numbers five, six, twelve and twenty-nine.

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Complainants claimed that the coupons attached to the bonds for one thousand dollars each, numbered from thirty-one to thirty-eight, both inclusive, held by them and due July 1, 1876, were not paid and were still due and unpaid, and that the coupons due on said bonds on the first days of January and July had not been paid; and that none of the coupons falling due July 1, 1877, on the bonds held by complainants, had been paid.

It was made to appear by the evidence submitted that on the 31st day of August, 1876, the Rising Fawn Iron Company ceased to carry on business, and that all its officers left the state of Georgia, where its property was situate. The property was, however, left in charge of T. J. Lumpkin, an attorney-at-law, as agent for the company.

On September 9, 1876, all the personal property of the company was sold to one Hale on execution at sheriff's sale for the benefit of judgment creditors, and on December 21, 1876, the personal and real property of the company was sold on execution to J. W. Cureton, and that he took possession of both the real and personal property. In March, 1877, a convention of the creditors of the company who were not holders of first mortgage bonds, leased the furnace and other property to one W. C. Peters, who went into possession and kept the furnace in operation from April, 1877, to July 26 of the same year, when Cureton again took possession of said property. He carried on said furnace for a short time after he resumed possession, but soon blew out and quit work for want, as he stated, of a supply of fuel, and the furnace had not again been put in blast until after the filing of the bill in this case.

It was charged in the bill, and not denied, that the property covered by the deed of trust consisted of several thousand acres of land, on which a blast furnace had been erected, with all the machinery, tools and appliances necessary to carry on the business of manufacturing pig iron. There was also on said land about five miles of railway and two locomotive engines and several cars, a large pair of scales, tools of various kinds, movable engines, and other valuable property not

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attached to the realty. After the sales above referred to, a large part of said movable property was carried away from the premises and state, or used up and worn out. At the time of the filing of the bill many persons were living on the land who paid no rent and cut timber and did other acts of waste, and some of the land had been sold for taxes.

While the property was in the possession of Peters it was greatly damaged and materially deteriorated in value. When the furnace was blown out by Cureton, soon after the tenancy of Peters ceased, it was partially filled with a mass of cinders, iron, limestone and other matter which had chilled and solidified, and could only be removed by drilling and blasting.

For some time before this bill was filed, Cureton had been engaged in removing this mass from the furnace and in putting it generally in order, and after the bill was filed he put the furnace in blast, and the weight of the evidence was that when the receiver in this case was appointed, the furnace was in good repair, and, under the management of Cureton, was doing well.

The complainants claimed that they were the holders and owners, among others, of eight bonds of \$1,000 each, numbered from thirty-one to thirty-eight, inclusive, dated March 6, 1876, on which the interest coupons, due July 1, 1876, for \$31.94 each, were and still remained unpaid, as well as the interest coupons due January 1, 1877, for \$50 each.

The facts with regard to the issue of these and other bonds held by the complainants were, as appeared from the evidence, as follows: Some time before July 1, 1876, when the first coupons fell due, the Rising Fawn Iron Company had hypothecated said bonds, with all the coupons attached to secure certain debts, evidenced by notes, which the company owed. These notes were not due at the time of the hypothecation, nor did they fall due until some time after July 1, 1876. The parties for whose benefit these bonds were hypothecated had no right, under the contract of hypothecation, to sell the bonds until after the notes they were given to secure became due, and the bonds were not in fact sold by the pledgees until after that time.

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J. S. Haselton testified that about June 15, 1877, he contracted to sell to Morrow, one of the complainants, first mortgage bonds of the company to the amount of forty thousand dollars, and in a few days afterwards the contract was completed by the delivery of the bonds to Morrow and the payment therefor by him, and among the bonds so delivered were eight to which all the coupons were attached.

At the time of the contract between Morrow and Haselton the bonds, afterwards delivered to Morrow, were hypothecated or held by creditors of the Rising Fawn Iron Company, and this fact was then known to Morrow. After the date of said contract, said bonds so held as collateral were sold by the pledgees and purchased by Haselton, so that he might be able to perform his contract with Morrow.

There was no presentation for payment on July 1, 1876, of the coupons on the eight bonds held by complainants, nor was it shown or claimed that there were funds provided at the place where said coupons were payable to pay the same on that day.

It appeared by a supplemental bill that none of the coupons on any of the bonds due January 1, 1878, and July 1, 1878, had been paid, although on July 1, 1878, the coupons held by complainants were presented and payment demanded.

The complainants claiming that default had been made in the payment of the interest coupons due July 1, 1876, on the said eight bonds heretofore particularly mentioned, and on coupons attached to other bonds held by them, served notice on the trustees named in the deed of trust, of such default, and required them to take possession of said trust property in accordance with the terms of the trust-deed, and to proceed to advertise and sell the same, and to apply the proceeds to the payment of the sums due on the first mortgage bonds.

With this demand the trustees refused to comply, and thereupon complainants filed this bill to enforce, for their benefit and the benefit of all other holders of first mortgage bonds, the trusts in said deed of trust contained.

Messrs. J. L. Hopkins and J. T. Glenn, for complainants.

Messrs. H. K. McCay and R. P. Trippe, for defendants.

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WOODS, Circuit Judge. The question to be determined is, whether, on the facts shown by the pleadings and evidence, the court ought to discontinue the injunction and to discharge the receiver and restore the possession of the trust property to Cureton, the alleged purchaser at sheriff's sale.

No objection is made to the receiver appointed by the court or to his management of the property—which his reports show to be reasonably successful and profitable.

In my judgment, the facts abundantly justified the appointment of a receiver in the first instance, as the case was then presented to the district judge. If there was a default in the payment of interest coupons for the period of six months after they fell due, the trustees named in the deed of trust were authorized, upon the request of the holder or holders of any of the bonds, to enter upon and take actual possession of the trust property, and to advertise and sell the same. And by the express stipulation of the trust-deed, the Rising Fawn Iron Company reserved the right to the possession and management of the trust property only so long as no default should be made in the payment of either interest or principal of the bonds.

Cureton, by his purchase at sheriff's sale on a subsequent incumbrance, could not place himself in a stronger position than the company itself. Suppose there had been no sheriff's sale, and the company had remained in possession of the trust property, could it have lawfully resisted the right of the trustees to demand and take possession of the trust property after six months' default in the payment of the principal or interest of the bonds? The right to the possession after such default is as clearly conferred by the trust-deed as the right to payment of the principal and interest on the bonds. If the company could not resist the demand of the trustees to take possession of the trust property after default, neither could it claim that this court could not rightfully take possession on a bill filed by the bondholders to enforce their rights under the trust-deed. If the contingency existed when it was the right and duty of the trustees, in the execution of their trust, to take possession of the trust property,

it was incumbent on the court, upon failure of the trustees to discharge that duty, to compel them to act or to appoint some one to act in their stead.

Independent, therefore, of any jeopardy to the trust property, the company lost, and the trustees acquired, the right to the possession of the trust property, after six months' default in the payment of the interest coupons.

But the evidence is satisfactory to the point that there had been, at the time of the filing of the bill, serious loss and depreciation of the trust property.

The question on which the motion turns is, has there been any default on the part of the Rising Fawn Iron Company, in the payment of the interest coupons attached to the first mortgage bonds held by complainants.

The complainants assert that there has, and the defendants, the Rising Fawn Iron Company and Cureton, assert that there has not.

There is no dispute that the interest coupons, due July 1, 1876, on the eight bonds heretofore specified, held by the complainants, were not paid on that day, and have not since been paid.

The reply of the defendants to this fact is: *First.* That there was nothing payable on the coupons falling due July 1, 1876, because the bonds to which they were attached were deposited before July 1, 1876, as collateral security for debts which did not mature until after that date.

This ground appears to me to be clearly untenable. By depositing the bonds as collateral security, with all the coupons attached, the company made the pledgee the legal holder, subject only to the rights of the company, on payment of the debt for which they were held as security. If the pledgee had transferred the bonds to an innocent purchaser, such transfer would have carried with it the legal title.

In Georgia, by express enactment, the holder of a note, as collateral security for a debt, stands upon the same footing as a purchaser: Code of Georgia, sec. 2788. See, also, *Goulman v. Simonds*, 20 How., 343; 1 Daniel on Negotiable Instruments, secs. 820, 821, 822, 824, 825.

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When, therefore, the bonds were pledged as collateral security, the pledgee became the legal holder, and he became the holder of all the coupons attached and not due, as well as of the bond itself. The bonds and the coupons were all pledged for the payment of the debt which was secured by the deposit of the bonds and coupons. The fact that the debt secured was not due did not relieve the coupons, any more than the bond itself, from the effect of this hypothecation. To hold otherwise would be to hold that if the bonds then due fell due before the debt secured by the pledge of the bond, their hypothecation was without any effect whatever: 1 Daniel on Negotiable Instruments, secs. 825, 826.

This is true, where the pledge is made to secure a pre-existing debt. In this case it does not appear that the bonds were transferred to secure a debt already existing. The presumption is, that the creation of the debt and the giving of the security were contemporaneous.

It is clear to my mind that the pledgees of the bonds deposited as collateral security, before July 1, 1876, were legal holders, and had the right to demand and receive the interest due July 1, 1876. This right was a part of their security. Upon the failure to pay the coupons, the pledgee had all the rights of any other legal holder or purchaser of the bonds. And a default, for six months, in the payment of such interest, gave the pledgee the same right as any other purchaser to insist that the principal of the bond had become due in accordance with its terms and the terms of the trust-deed. In short, the collateral holder took the bonds and coupons with all their terms and stipulations, unaffected by the fact that they were held as security for another debt, and that that debt was not due. He had the right to collect the interest on the bond as it fell due, to enforce payment of the principal in accordance with the terms of the bond. He only differed from an absolute owner in this, that he was bound to account for any surplus received from the bonds and coupons, over and above what was necessary to the payment of his debt.

When the pledgee transferred the bonds to the complain-

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ants, they acquired all his rights. The fact, therefore, that the complainants knew before they purchased the bonds, that they were in pledge, has no effect, for the complainants are claiming no rights which the parties from whom they purchased the bonds did not have.

It is insisted that because the pledgee did not know that he was entitled to collect the interest coupons which fell due before the maturity of the debt secured by the pledge of the bonds, therefore he had no such right. But men's rights are not lost by the fact that they are ignorant of them, much less can such ignorance destroy the rights of the subsequent holder of the bonds.

In my judgment, the collateral holder of the bonds, on July 1, 1876, had the right to demand payment of the coupons due on that day, and on a default of payment continuing six months, had the right to demand as due, by reason of such default, both the principal and interest on his bonds, and that when he transferred his bonds and coupons, for value, to a purchaser, the transfer carried with it all the rights of the original collateral holder.

But it is claimed, second, by defendants, that there was no default in the failure to pay the coupons due July 1, 1876, because there was no presentation of the coupons for payment.

Generally, a suit may be brought on any commercial paper, payable at a particular place, without demand at that place: *Wallace v. McConnell*, 13 Pet., 136; *Montgomery v. Elliott*, 6 Ala., 701.

The peculiar form of the bond, in this case, it is insisted, takes it out of this general rule. The bond promises to pay the principal and "interest at the rate of ten per cent per annum, payable semi-annually on the first days of January and July in each year, on presentation of the respective coupons hereto attached, both principal and interest being payable at the financial office of said company, in the city of New York."

Neither the act authorizing the company to issue bonds, nor the mortgage nor the coupons themselves, say anything about the presentation of the coupons as a condition of pay-

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ment. Does the form of the bond require presentation of the coupon and demand of payment before the company can be put in default? It seems to me that it does not. If a cause of action accrues on a coupon in which the words "on presentation" do not occur, as soon as it falls due and is unpaid, without any demand, I do not think the insertion, in the trust-deed, of the words "on presentation of this coupon," changes the rule. The evident purpose is to indicate that the interest is to be paid on the coupon, without the production of the bond. The words do not change the legal effect of the coupon, for the company is not bound to pay unless the coupon is not only presented but delivered up: *Wolcott v. Van Santvoord*, 17 Johns., 248; 2 Daniel on Negotiable Instruments, sec. 1508.

But it is said that if this construction is correct any coupon holder could, by failure to present his coupon for payment when due, cause both the principal and interest on all the bonds to become payable long before the date named for their maturity.

No such result would follow if the company could truly aver that it had funds at the place designated for the payment sufficient to pay the coupons if they had been presented. This would be a conclusive answer to the claim that the principal of the bonds had become due, by reason of default in the payment of interest.

It is averred in the bill that no funds were provided for the payment of these coupons on the eight specified bonds which fell due July 1, 1876. This is not denied in any answer or affidavit filed in this case, though it was clearly within the power of the company to prove the fact that it had provided for the payment of these coupons at maturity, if such had been the case, for it is not pretended or claimed that funds were ready for the payment of these coupons, if they had been presented. The defense relied on is the failure to present the coupons for payment at a place, where there was no money provided to pay them.

The coupons attached to the eight bonds were due July 1, 1876. They were not paid on that day, nor was any money

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provided for their payment. No payment was made, nor offered to be made, within six months after the maturity of the coupons. By the terms of the bond and trust-deed, both the principal and interest of the bonds became due. No offer has been made to pay the principal and interest. The company itself has never provided any funds to pay interest, and the interest due January 1 and July 1, 1878, has never been paid by any one.

The evidence is overwhelming, that in a commercial sense the company is insolvent. It appears to me, from the facts of the case, that its property, if brought to sale, would not pay the first mortgage bonds and interest. There appears, therefore, no reason why the order of the district judge, in vacation, appointing a receiver, should be revoked. On the contrary, if the case were presented here for the first time, we should feel bound to accede to the prayer of the bill, and allow the injunction and appoint a receiver, as has already been done.

It was suggested in the argument, that the sale of the bonds of the company, which had been pledged as collateral security for the company's own debt, at a price below par, amounted to usury, and the bonds and coupons were, therefore, void.

As this is nowhere set up in any of the answers filed in the case, it is not necessary or proper now to discuss or decide it.

It was also claimed, in argument, that some of the judgments on which the Rising Fawn Iron Company's property was sold were founded on mechanics' liens, and that they were superior to the lien of the first mortgage bonds, under the constitution of Georgia. This, also, is matter of defense not set up in any of the answers. On the contrary, the answers of the company admit that the first mortgage bonds were the first and highest lien on the property covered by the trust-deed. It is, therefore, unnecessary at this time, to discuss this question.

The motion to continue the receiver and injunction must prevail.

Jordan v. Wells.

WILLIAM R. JORDAN v. B. E. WELLS, RECEIVER, ETC.

1. A court by which a receiver has been appointed ought not to allow the receiver to be sued, unless the petition for leave states a *prima facie* cause of action against him.
2. To justify a recovery against a master by one servant for an injury caused by the carelessness or negligence of a fellow-servant, it must be shown that the servant by whom the injury was caused was incompetent, and that the master was guilty of willful negligence in employing him.

This was a petition wherein leave was asked by the petitioner to bring suit against Wells, as receiver of the Rising Fawn Iron Company.

The principal cause was a suit in equity in this court to foreclose a mortgage on the property of the Rising Fawn Iron Company, executed to secure a series of bonds made and sold the defendant company. On motion of the complainants, B. E. Wells had been appointed receiver of the property and effects covered by the mortgage, with authority to take care of the property and carry on the business of the company.

The petition of Jordan alleged that, in order to perform the duties imposed on him by the order of the court, it became necessary for Wells, the receiver, to cause to be run a locomotive engine belonging to the company over a railroad track, also the property of the company.

That on May 13, 1878, the engineer who was usually in charge of said locomotive was off duty, with the consent of the receiver, and one Tidwell, a person unskilled in the running of locomotives generally, and of this one in particular, was put in charge of the same by the receiver and required to run it.

The petitioner was employed by the receiver as fireman and coupler on said engine, and it was his duty to make all couplings and change all switches as necessity required, and after changing a switch he was required to get back on the engine while the same was in motion, the order of the receiver

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not allowing the engineer to stop the engine, but merely to bring it to a slow rate of speed.

That petitioner, on July 13, 1878, after adjusting the switch, undertook, as usual, to mount the engine, but was unable to do so, because of the speed at which the said Tidwell caused it to run, he being unacquainted with it and unable to control it. The petitioner's foot slipped from the step and was caught under the wheel of the tender and so badly crushed that amputation became necessary, and was performed on May 25, 1878.

Petitioner alleged that he had sustained great damage in the premises, and asked for leave to sue the receiver in order that the measure of his damage might be fixed and ascertained.

The substantial facts alleged in the petition are verified by an affidavit of the petitioner, and are not upon this hearing disputed.

Mr. E. W. Hoge, for petitioner.

Messrs. J. L. Hopkins, J. T. Glenn and H. C. Erwin,
contra.

Woods, Circuit Judge. It may be laid down as a general rule that leave should be granted to sue a receiver where the petitioner makes out by his petition and affidavits a *prima facie* cause of action. The court ought not to undertake in advance, on such a petition, to decide the case against the petitioner. But it is essential that the petition should, on its face, show that the petitioner has a case. The court should not allow its receiver to be harassed by a suit where, according to his own showing, the plaintiff has no cause of action.

Do the facts set out in this petition show that the petitioner has a case against the receiver on which he ought to recover?

It is settled by the great preponderance of adjudicated cases that the master is not liable for an injury sustained by one servant from the carelessness or negligence of his fellow-servants.

To justify a recovery in such a case, the master must know-

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ingly and negligently employ incompetent servants, and the injuries for which redress is sought must be caused by the incompetency of the servant: Cooley on Torts, 559.

The averment of the petitioner in reference to the employment of the engineer alleged to be incompetent, is as follows: that "one L. S. Tidwell, a person unskilled in running locomotive engines, and this engine in particular, was put in charge by said receiver, and required to run said engine."

There is no averment that the receiver negligently and knowingly employed an unskillful and incompetent engineer. From all that appears either in the petition or affidavit, the receiver may have believed and have had good grounds to believe that Tidwell was a competent and skillful engineer.

It appears to me to be clear that, if the facts set out in the petition and affidavit were embodied in a declaration, it would be demurrable, because it did not set forth a good cause of action.

The petitioner, to justify a recovery, must not only aver, but prove, willful negligence on the part of the receiver, in the employment of an unskillful person, and an injury to him by reason of such unskillfulness of the person so employed. As this is not shown either in the petition or affidavit, the petitioner does not make out a *prima facie* case, and his petition for leave to sue the receiver must be denied.

MARCH TERM, 1879.

THE UNITED STATES v. WESLEY SCROGGINS.

1. A United States marshal, who receives a warrant to be served from a circuit court commissioner, is bound to make return of his doings thereunder.
2. The United States attorney has no authority to take from the hands of the marshal warrants regularly issued to him by a circuit court commissioner, for the purpose of deciding whether or not such warrants shall be executed.

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W. H. Smyth, a commissioner of this court, filed his petition, in which he represented that as such commissioner he had issued a warrant for the arrest of one Wesley Scroggins, directed to the United States marshal for the northern district of Georgia; that this warrant was dated January 17, 1879, and on that day placed in the hands of the marshal for execution; that on February 10, 1879, he, the said commissioner, addressed an official letter to the marshal inquiring what disposition he had made of said warrant; that the marshal replied to said letter, and to other letters of the same tenor, subsequently addressed to him by the commissioner, declining to give the information sought, and refusing to make any return to the commissioner of his actings and doings under said warrant.

The petitioner, therefore, prayed for a rule upon the marshal to show cause why he had not executed the warrant, and why he should not make a return thereof to the commissioner.

The court granted the rule prayed for by the petition, and in compliance therewith the marshal answered:

1. That he had not made return of his actings and doings on said warrant to the commissioner, because he was not required to do so by any law known to him.

2. That he had not executed said warrant because, after the same was placed in his hands by the commissioner, it was taken from him by the district attorney for consideration and determination by that officer, whether or not the public interests required it to be executed, and it was still in the hands of the district attorney for that purpose.

The matter came on for hearing upon the sufficiency of these answers to the rule.

Messrs. A. T. Akerman and H. K. McCay, for the marshal.
Mr. W. H. Smyth, contra.

WOODS, Circuit Judge. 1. There is no ground for the idea that a marshal can receive warrants, commanding him to arrest parties therein named, and make no return thereon. He is clearly bound to make return, either that he has

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arrested the party against whom the warrant was issued, or that the party could not be found in his bailiwick, or give some other excuse for not making the arrest.

The oath of office prescribed for the marshal requires him to "faithfully execute all lawful precepts directed to him under authority of the United States, and true returns make." Such, also, is the course required by the common law. The officer may retain the warrant for his own protection, but he must return to the justice what he has done in pursuance of his command: 2 Lord Raymond, 1196; Beck. Just. Arrest, 14. So, by the Code of Georgia, constables may be ruled by their respective justices' courts, and compelled to give an account of their actings and doings: Code of 1873, sec. 4170. What they may be ruled to do, it is their duty to do without rule.

The idea that a ministerial officer may pocket a warrant issued to him by lawful authority, and refuse to make any return, or give any reason for not executing it, is, in my judgment, without any foundation, at either the common law, or in the statutes of the United States.

The marshal may, it is true, make his return to the commissioner before whom he takes his prisoner for examination, but he must make a return to him. If the person against whom the warrant issues cannot be found, a return of that fact should be made to the commissioner who issues the warrant.

By a rule of this court, adopted June 10, 1878, every commissioner of the court is required, at the close of every fiscal year, to file in the office of the clerk of the court a report of all warrants issued by him during the year, stating against whom and on whose affidavit issued, and stating how many, and which of said warrants have been executed, etc.

Clearly, it is impossible for the commissioner to comply with this rule, if the marshal refuses to make return of the warrants placed in his hands; or if he has made return of the warrant to another commissioner, before whom he has taken the prisoner, and refuses, when officially inquired of by the commissioner who issued the warrant, to state that fact.

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Under this rule, it clearly becomes the duty of the marshal to give to the commissioner at least a report of his actings and doings under the warrant placed in his hands.

2. The second question presented by the answer of the marshal to the rule, is, whether the district attorney has authority to take commissioners' warrants from the hands of the marshal, in order to determine whether they should be executed or not.

I can find no statute law or usage which confers such a power on the district attorney. The Revised Statutes of the United States, section 1014, expressly confer on any justice or judge of the United States, and on the commissioners of the circuit court, power to arrest, imprison or bail offenders against the laws of the United States, agreeably to the usual modes of process against offenders in the state where the arrest is made. This power, conferred on the commissioners by this section, is precisely the same as that conferred on the justices of the United States Supreme Court and the judges of the circuit courts. It is not made subject to the supervision of the marshal or district attorney. The judge or the commissioner acts on his own responsibility, and is not accountable to, or subject to the control of either of these officers. If the district attorney has no authority to suppress a warrant issued by the chief justice of the United States, he cannot interfere with the warrant of a circuit court commissioner, for both derive their powers from precisely the same law.

As well said by Justice Field, in *United States v. Schumann*, 2 Abbott U. S. Reports, 523, "the commissioner is made a magistrate of the government, exercising functions of the highest importance to the administration of justice. He is an examining and committing magistrate, bound to hear all complaints of the commission of any public offense against the laws of the United States in his district, to cause the offender to be arrested, to examine into the matters charged, and to commit for trial or to discharge from arrest, according as the evidence fails or tends to support the accusation. For the faithful discharge of his duty in these pr-

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ticulars he alone is accountable. He has no divided responsibility with any other officer of the government, nor is he subject to any other's control."

And in the case from which this citation is made, Justice Field held that even after the offender was arrested and the case was under examination before the commissioner, the district attorney had no absolute power to dismiss the proceeding. Much less has he power to suppress a warrant before arrest.

If the district attorney can suppress a commissioner's warrant after it is issued and before it is executed, he can forbid the commissioner to issue the warrant. If he has this supervision of the conduct of the commissioners, he has the same over the conduct of the circuit justices and the circuit and district judges, and can forbid them to issue warrants, although, in their judgment, the warrants should issue. Such a power will hardly be claimed for the district attorney, and yet such a power is the logical sequence of what is claimed for him on this hearing.

No claim that the power is exercised by the district attorney, to prevent abuses or control expenses, can justify it. The power does not exist in that officer, and it would be a most dangerous power, and liable to the greatest abuses, if it did.

We have been referred to sections 838 and 3164 of the Revised Statutes, as warrant for the action of the district attorney in this case. A glance at section 831 will show that it has no reference to criminal proceedings, and an examination of both sections will show that neither confers on the district attorney any supervision over circuit court commissioners, or the warrants issued by them.

In my judgment, the answers of the marshal to the rule are insufficient. It is his duty to execute all warrants that lawfully come to his hands, and to make due return thereof, and the officer issuing the warrant is entitled to know what is done under it.

As both the marshal and district attorney have acted in this matter in the highest good faith, and from a sense of

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duty only, it will not be necessary to do more than to pass an order requiring the marshal to make return to the commissioner of his actings and doings under the warrant against Wesley Scroggins.

And it is so ordered.

SOUTHERN DISTRICT OF ALABAMA.

DECEMBER TERM, 1876.

SIBLEY V. THE CITY OF MOBILE.

1. Where an act of the legislature authorized a city to issue its bonds in aid of a railroad company, and ratified a contract by which the city, having issued its said bonds, agreed to appropriate sufficient money from its treasury to pay the accruing interest thereon, the city was thereby authorized to levy a tax to pay said interest, and such authority carried with it the duty to make the levy.
2. But when, at the time of the issue of the bonds, the constitution of the state limited the taxing power of the city to a certain per centum upon its taxable property, the city could not exceed that limit; but having first levied a tax sufficient to pay its current expenses, it was bound by its contract to exhaust, if necessary, the residue of its taxing power in order to pay the interest on said bonds.
3. Where such a constitutional limit to the taxing power existed, it was not competent for the legislature, by an act passed after the issue of said bonds, to direct that the entire taxing power of the city should be exhausted for the payment of the holders of bonds of another issue who had no specific claim upon the fund raised by taxation, or any part thereof.
4. Where the taxing power of the city was limited by the constitution, all the holders of the bonds issued by the city were entitled to share *pro rata* in the general fund raised by taxation, which remained after the payment of the current expenses of the city.
5. A city with a limited power of taxation which, by neglect to levy and collect taxes, has permitted the interest on certain of its bonds to fall in arrears, cannot defend against an application for the writ of *mandamus* to compel the levy of a tax to pay a judgment recovered for interest due on bonds of a later issue, by alleging that a levy to pay the interest in arrears on the older issue would exhaust its taxing power, when at the same time it expresses no purpose to levy a tax for that object.

Heard on motion for peremptory *mandamus*. The case was as follows:

On February 23, 1876, the plaintiff recovered in this court

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against the city of Mobile a judgment for \$23,560. The judgment was based on five hundred semi-annual interest coupons for \$40 each, which had been originally attached to one hundred bonds for \$1,000 each, issued by the city of Mobile in aid of the Mobile & Alabama Grand Trunk railway company. The authority to issue these bonds was based on an ordinance of the city dated June 25, 1869, and afterwards, and before the issue of the bonds, confirmed by an act of the legislature of Alabama, dated January 17, 1870.

The ordinance, after setting out the terms of a contract between the city of Mobile and the railroad company, by which the city agreed to loan its bonds to the latter, authorized the issue of bonds, and declared that "the city shall be bound to appropriate sufficient moneys from its treasury to pay the interest provided to be paid by the city," to be raised at the option of the city by general or special tax.

The act of the legislature, after first approving the ordinance and a contract for the issue of the bonds made by the city with the railroad company in pursuance of the ordinance, and declaring said contract "legal and binding on the city," enacted as follows: "The corporate authorities of said city of Mobile shall have and they are hereby invested with power and authority to adopt such ordinances, by-laws, and resolutions, and to provide such ways and means as shall be necessary or proper for the full execution and performance of said contract so made with said railroad company."

The bonds having been issued in pursuance of the authority conferred by the ordinance and the act of the legislature, were put in circulation, and the city having five times made default in the payment of the semi-annual interest, suit was brought upon the dishonored coupons, and the judgment above mentioned recovered. Execution was issued on the judgment and returned unsatisfied, whereupon a demand was made upon the city authorities that they should levy a tax to pay the judgment, which they refused to do.

Thereupon, according to the practice in the state courts of Alabama, a petition was filed against the city of Mobile, asking for a rule *nisi* upon the city, calling upon it to show

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cause why the peremptory writ of *mandamus* requiring it to levy tax should not issue. The rule was allowed, and the city filed its answer thereto.

The answer denied that it was the legal duty of the city to levy the tax, and in support of this averment stated, that by the constitution of the state of Alabama, in force when said ordinance and act of the legislature were passed, and said bonds issued, the city of Mobile was restrained from collecting a greater tax than two per centum upon the assessed value of its taxable property, and by the constitution now in force, the same limitation of the power of the city to tax still existed, with this additional provision, that for the payment of its existing indebtedness the city could levy not more than one per cent upon its taxable property, and for its current expenses not more than one per cent.

The answer further alleged that over and above the sum necessary for the expenses of the city government, there could be collected for the year 1877, under the limitations of the constitution of Alabama, not more than \$145,000, applicable to the payment of the city debt; that there remained due and unpaid of the principal of a series of bonds issued by the city, by authority of an act of the legislature passed in 1843, the sum of \$3,100, and four years' accrued interest, amounting to \$3,600, and that for the payment of the said principal and interest, the taxes upon the real estate of the city were pledged and appropriated.

That there was also outstanding and unpaid of the principal of a series of bonds issued by the city, by authority of an act of the legislature passed in 1858, the sum of \$137,000, besides four years' arrearages of interest, amounting to \$43,840, making a total of \$180,840, to provide for which, and the annually accruing coupons, the city was bound, under its contract, and by virtue of the act of the legislature aforesaid, to provide, by an annual tax, a sum at least proportional to the original amount; that is to say, about the sum of \$17,000.

The answer further stated, that on January 1, 1876, the bonded debt of the city, principal and interest, amounted to

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\$3,332,901, of which \$880,094 were for bonds and interest thereon, issued to the Mobile & Alabama Grand Trunk railroad company, and of which the debt claimed by the relator formed a part; that it was impossible for the city, with the means at its command, to pay this debt, the annual interest on which amounted to \$200,000, while the maximum of taxation allowed for all purposes on the taxable property of the city, would only produce a sum not exceeding \$340,000.

The answer further alleged that a compromise of the debt was all that was practicable; accordingly, the legislature of the state, by an act approved March 9, 1875, had provided for the reduction and funding of the debt of the city. The act authorized the city to issue \$2,000,000 of coupon bonds, for the purpose of settling and funding its debts, and created a contract lien "on the yearly revenues of the city, to be raised by taxation each year, to the extent necessary to pay the interest on said bonds due and falling due each year, and to raise a sinking fund of \$50,000 each year for the payment of the principal of said bonds." And the said act restricted the power of the city to levy taxes to the raising of such amounts as might be necessary to discharge the interest on the bonds therein provided for, and for the said \$50,000 for the sinking fund, and for such sum as might be necessary to pay the current expenses of the city government.

The answer further alleged that \$1,185,500 of bonds had been issued under the said act of March 9, 1875, and that the city was compelled to raise for the current year, under said act, the sum of \$121,130, which was declared to be a lien on the revenues of the city raised by taxation; that the funding and adjusting of the city debt was still in progress, and other bonds were being issued, so that the amount to be raised for interest was being continually increased.

The city, therefore, affirmed that all its powers to levy taxes to pay debts would be entirely exhausted in the effort to provide for those classes of its bonded debt for which special provision had been made under authority of the legislature, and that no margin would be left out of which to pay

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debts not thus provided for, and relator's coupons belonged to a class of debts for which no special provision was made.

The city, therefore, insisted that it had not the power or authority to levy the taxes which the relator prayed the court to require it to levy.

When the acts of 1843 and 1858, above referred to, were passed, there was no constitutional limit on the taxing power of the city.

To this answer of the city the relator demurred, and upon this demurrer the case was argued and heard.

Messrs. Geo. N. Stewart and Harry Pillans, for the relators.

Messrs. Stevens Croom, city attorney, and *Peter Hamilton and J. A. Hamilton*, for the city of Mobile.

WOODS, Circuit Judge. The act of the legislature of January 17, 1870, conferred ample authority upon the city of Mobile to issue the bonds from which the coupons of relators were detached, and even without express authority to that effect, implied an authority to levy a tax for their payment: *Loan Association v. Topeka*, 20 Wall., 655; *Gibbons v. The Railroad Co.*, 36 Ala., 439; *Ex parte Selma & Gulf Railroad Co.*, 45 Ala., 696; *Ohio v. Commissioners of Clinton Co.*, 6 Ohio St., 280; *United States ex rel. Ranger v. New Orleans*, 2 Woods, 230.

Besides the implied power there is an express agreement, on the part of the city, set out in the ordinance of June 25, 1869, and approved and ratified by the legislature, by the act of January 17, 1870, by which the city bound itself to appropriate sufficient moneys from its treasury to pay the interest, and reserved to itself the right to raise the same by special tax, which reservation was also approved by the same act of the legislature.

The city acted upon this authority, and, as its answer shows, for several years levied a special tax to pay the interest on the bonds issued to the Mobile & Alabama Grand Trunk railway company.

The authority to levy the tax for the payment of the interest on these bonds carries with it the duty to make the

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levy. The power to levy the tax is in the nature of a trust for the benefit of the holder of the bonds. The rights of the creditor and the ends of justice demand that it should be exercised in favor of affirmative action, and the law requires it: *City of Galena v. Amy*, 5 Wall., 705; High on Ex. Rem., sec. 397; *Supervisors v. United States*, 4 Wall., 435.

When the bonds which relator holds were issued, the law authorized, and, in effect, required, the levy of a tax to pay the interest thereon as it accrued. This law formed a part of the contract as much as if it had been written on the face of the bonds: *Gelpcke v. Dubuque*, 1 Wall., 175; *Von Hoffman v. Quincy*, 4 Wall., 535; *Gunn v. Barry*, 15 Wall., 610; *Commissioners v. Rather*, 48 Ala., 446; *Milner's Adm'r v. Pensacola*, 2 Woods, 632.

The city of Mobile, by its ordinance, confirmed by act of the legislature, has agreed to pay the interest on those bonds semi-annually, either out of its general revenue or by special tax. This contract is, of course, subject to the constitutional limit upon the taxing powers of the city restricting it to a levy not to exceed two per cent per annum.

The question is, therefore, presented by the demurrer to the answer, whether it was competent for the legislature, by an act passed subsequent to the issue of these bonds, to exhaust all the taxing power of the city, and direct the application of the proceeds of such taxation to other subjects, to the exclusion of the issue of bonds of which the relator holds a part. After authorizing the city to issue these bonds, and after approving the contract of the city to pay the interest semi-annually, either by a general or special tax; can the legislature authorize and direct that all the taxing power of the city shall be exercised for the benefit of the holders of other bonds who have no specific claim upon the funds raised by taxation, or any part thereof, to the exclusion of these? In my judgment, such an act would be a violation of the rights of the holders of the bonds thus excluded, and an impairment of their contract with the city of Mobile.

These bondholders are entitled to have all the taxing power of the city within the constitutional limit exercised, if neces-

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sary, to secure the performance of the contract made by the city with them. When that power is exercised, the current expenses of the city must be paid out of the fund so raised, and, as to the residue, the relators are entitled to share *pro rata* with the other creditors of the city who have no specific lien or claim to any portion of the taxes; and neither the city nor the legislature has the power to appropriate the taxing power of the city for the exclusive benefit of a class having no superior rights, while these relators have a contract in effect declaring that a part of the taxing power of the city shall be exercised for their benefit.

It appears, from the answer of respondent, that certain sums are due the holders of bonds issued under the acts of 1843 and 1858, for unpaid interest, and the answer avers that if these sums are paid, and also the sum required by the act of 1875, the taxing power of the city for the current year will be exhausted.

But there is no averment that it is the purpose of the city to levy any tax to pay the past due interest referred to; and, excluding taxation for such purpose, it appears that the city will not exceed its power to tax, if it should levy a sufficient sum to satisfy the judgment of the relators. Moreover, the bonds issued by authority of the acts of 1843 and 1858, cannot be affected by the limit imposed on the taxing power of the city by a constitution adopted after the issue of the bonds.

These relators are here pressing their right to be paid by taxation. The city cannot protect itself from its obligation founded on its own contract to levy the tax, by showing that it has failed in former years to do its duty by its creditors, and allowed interest to accumulate, while at the same time it expresses no purpose to levy a tax to pay such interest due and unpaid.

In my judgment, the facts set up in the answer of the city of Mobile constitute no reason why the writ of *mandamus* asked for by the relators should not issue.

The demurrer to the answer is, therefore, sustained.

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JUNE TERM, 1877.

SARAH A. LOCKHART ET AL. v. JOHN A. C. HORN ET AL.

1. A bill in equity was filed in the circuit court by certain legatees of a testator against the executor and other legatees, as defendants, to compel a settlement of the estate and a distribution of its proceeds among those entitled thereto. A final decree in accordance with the prayer of the bill was made establishing the amount due the complainants, and ordering its payment and allowing the legatees who were defendants to propound their claims by petition. In accordance with the decree, two of the defendant legatees filed petitions propounding their claims: *Held*, that the running of the statute of limitations against them was suspended by the filing of the original bill.
2. The only effect of a decree *pro confesso* is to enable the case to be proceeded with *ex parte* against the defendant as to whom it is taken. Unless followed by a final decree, it settles no rights.
3. An executor is not discharged from the payment of interest on a principal sum found due from him by the probate court, by showing that he invested the money in confederate bonds and received no interest, if the investment was made under such circumstances as did not relieve him from the payment of the principal.
4. The presumptions are in favor of the findings of the master. They will not be disturbed, unless shown to be erroneous.
5. It is not according to equity practice to institute upon a petition filed after final decree a new train of pleadings. The only purpose to be subserved by such a petition is to bring the claim of the petitioner to the notice of the court or master.

Heard on exceptions to master's report upon the petition filed by Frances L. Bryan and Elizabeth P. Nabors.

The original case was a bill filed in this court on February 15, 1867, by William Lockhart and Sarah Lockhart his wife, and Narcissa Lockhart, two of the heirs and legatees of John Horn, deceased, against John A. C. Horn, as executor of said John Horn, and as one of his heirs and legatees, and Leonidas L. Bryan, and Frances L. Bryan, Belton O. Nabors and his wife Elizabeth P. Nabors, Wm. McPhail and his wife Mary McPhail, heirs and legatees of said John Horn, deceased, and against John D. Alexander as surety on the

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bond of John A. C. Horn, as executor of John Horn, and as the administrator of Joseph M. Alexander, who was also a surety on the bond of John A. C. Horn, as administrator *ad colligendum*, and against S. S. King as the administrator of N. B. Leseuer, who was also a surety on Horn's bond.

The bill sought to set aside the probate of the will of said John Horn, deceased, but was chiefly for a settlement and distribution of the estate of said John Horn in the hands of John A. C. Horn, as executor.

The prayer of the bill was that the will of John Horn, deceased, be set aside, and that his estate be settled and distributed without reference thereto, etc., or if the will is not set aside, that John A. C. Horn, as executor, be held to account with complainants and the other legatees and devisees under the same, for his execution thereof, and that it be referred for an account, and that a decree be rendered against Horn and his sureties for whatever sum the said John A. C. Horn shall be found to be in arrears with the estate of John Horn, deceased.

The prayer further was "that the court will take full and entire jurisdiction of the settlement of said estate of said John Horn, and proceed to distribute the same to all persons entitled thereto under the law as the same may be determined by this honorable court, and that all accounts and equities subsisting between said John A. C. Horn and other persons entitled to said estate growing out of his administration of the same, to be fully and finally adjusted and settled."

McPhail and wife answered that John A. C. Horn had never accounted to Mary McPhail, and asked a settlement and decree for her share.

John A. C. Horn answered fully, and decrees *pro confesso* were taken against all the parties, including Frances L. Bryan and Elizabeth P. Nabors.

On the final hearing the bill was dismissed as to McPhail and wife, and so much of it as related to the setting aside and invalidating the will of John Horn was also dismissed. The court then decreed: "It is further ordered, adjudged and decreed that the defendant John A. C. Horn do pay to

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the complainants respectively (that is, to the two Lockharts), in the lawful money of the United States, the several amounts which were adjudged to be due to them by the decree of said probate court, made on the second day of May, 1864, together with lawful interest thereon from said date to the date of this decree (naming the specific amounts found by the decree of 1864); and it is further ordered, adjudged and decreed that the remaining defendants be authorized to make application for such order and relief as they may be entitled to ask on the principles of this decree," etc.

A decree *pro confesso* was taken against John D. Alexander on the original bill on the 14th January, 1870, but the same was never made absolute; and no decree was made against him in the final decree.

This decree of the circuit court was affirmed by the Supreme Court of the United States on appeal; and the decrees in favor of the Lockharts fully paid off and satisfied. The case in the circuit court is reported in 1 Woods, 628, and in the Supreme Court in 17 Wall., 570.

After the mandate of the Supreme Court came down on April 1, 1874, Frances L. Bryan, Elizabeth P. Nabors and McPhail and wife filed their petition in this court asking the court to grant them leave to present and establish their claims against said John A. C. Horn and John D. Alexander and the other sureties on the bond of John A. C. Horn, for the amounts ascertained to be due them respectively by the decrees of the probate court of Marengo county of May, 1860, and May, 1864.

To these petitions John D. Alexander, as an individual and as administrator of Joseph M. Alexander, filed demurrers setting up the statute of limitations of six years against both decrees.

He afterwards also filed answers setting up the statute of limitations to all the petitions, and to the petition of Frances L. Bryan that she has been paid in full.

The petitions and claims of F. L. Bryan and Elizabeth P. Nabors were referred to a master with instructions to hear the parties and take further evidence, etc. McPhail and wife's petition was not referred, the chancellor considering

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that they did not come within the words "remaining defendants" who were given leave to make application under the decree.

The whole case arising on the petitions was considered by the master, and the petitioners claimed the balances due by the decrees of May, 1860 and 1864.

The master held, against the objection of Alexander, that the reference embraced as well the decree of 1860 as that of 1864, and stated the account as though the decree of this court re-opened all the settlements in the probate court.

He, therefore, reported as due Mrs. Nabors, on the decree of the probate court of May, 1864, the sum of \$2,506.30, including interest. He reported as due Mrs. Bryan on the settlements made by Horn in the probate court in May, 1860, and May, 1864, with interest, after deducting all credits allowed to Horn, with interest, the sum of \$4,729.12.

Exceptions were filed to the master's report by Mrs. Bryan, by Horn, and by Alexander. The exceptions are noticed in the opinion of the court.

Messrs. John T. Morgan, Wm. Boyles and James W. Lapsley, for petitioners.

Messrs. John Little Smith, Thos. H. Herndon and S. J. Cumming, for Horn and Alexander.

Woods, Circuit Judge. So far as the petition of McPhail and wife is concerned, it must be dismissed, because by the terms of the decree it was only to the parties remaining after the dismissal of the bill as to McPhail and wife that the privilege was given to make application for such order and relief as they might be entitled to ask, on the principles of the decree.

The exceptions filed by Alexander to the report of the master on the claims of Mrs. Bryan and Mrs. Nabors, are based on the ground that they are barred by the limitation of six years prescribed by paragraph six, of section 2901 of the Revised Code of Alabama, cannot prevail.

The provision of the statute referred to is as follows :

"Actions against the sureties of executors, administrators

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or guardians, for any misfeasance or malfeasance whatever of their principal, the time to be computed from the act done, or omitted, by their principal, which fixes the liability of the surety," must be brought within six years.

Alexander claims that his liability arose from this fact, only that he was the surety on the bond of Horn as executor; that the default of Horn dates from the decree of the probate court against him, rendered in 1864, and that, as the petitions of Mrs. Bryan and Nabors, in this case, were not filed until April, 1874, their claims are barred by the statutory provision aforesaid.

But it seems clear that the running of the statute was interrupted by the filing of the original bill in this case, on the 15th of November, 1867.

The bill was filed, in effect, for all the distributees of the estate. It prayed "that said pretended will be set aside, etc., and that the defendant John A. C. Horn might be held to full and just account for all property and money, rents and accumulations of said estate, with those persons entitled to distribution and inheritance thereof. Or, if said will is not set aside, that said John A. C. Horn, as executor thereof, be held to account with orators and the other legatees and devisees under the same, for his execution thereof," etc.

The court, by its decree, dismissed so much of the bill as assailed the validity of the will of John Horn, and adjudged that the defendant John A. C. Horn pay to the complainants the sums found to be due to them respectively by the decree of the probate court of May 2, 1864, and reserved the right to the remaining defendants, who are now these petitioners, to make application for such order and relief as they might be entitled to ask on the principles of the decree. As soon as this decree was finally affirmed by the Supreme Court of the United States, these petitions were filed. It cannot be possible that while this bill was pending, seeking to call this defendant Horn to account to all the legatees under the will of John Horn, a part of said legatees being complainants, and a part defendants, to the bill, that the statute of limitations was running against those who happened to be defend-

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ants. It is even immaterial whether the petitioners whose application is now under consideration, were complainants or defendants. The bill inured to their benefit, and it was so decreed by the court.

In the case of *Payne v. Hook*, 7 Wallace, 425, the Supreme Court says, "A court of equity adapts its decree to the necessities of each case, and should the present suit terminate in a decree against the defendant, it is easy to do substantial justice to all the parties, and prevent a multiplicity of suits by allowing the other distributees, either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation."

That is what has been done here. No new parties have been made—no new liabilities suggested. The only purpose of the application of these petitioners is to ascertain the amount due them, on the principles of the decree made on the original bill.

The language of a decree in chancery must be construed with reference to the issue which is put forward by the prayer for relief, and other pleadings, and which thus show it was meant to decide: *Graham v. Railroad Co.*, 3 Wall., 704.

To allow the defendants to the original bill to claim that, while the litigation was proceeding against them in the main cause, the statute of limitations was running against all the distributees who were not complainants in the bill, is not founded on any sound theory of the statute.

But while Alexander cannot set up, successfully, the statute of limitations, there is another ground suggested in his brief, on which he can resist the rendition of any decree against him in favor of either Mrs. Bryan or Mrs. Nabors, and that is, that there is no decree rendered against him in the main suit. The circuit court rendered a decree against John A. C. Horn, but none against Alexander. The decree against Horn was appealed from, and affirmed by the Supreme Court. That is an end of the main cause. There was no decree absolute against Alexander in the main cause. For some reason which does not appear, the court did not hold

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him liable upon the case made by the original bill, and the decree *pro confesso* against him. The effect of the decree *pro confesso* against him was simply to enable the case to be carried on as to him *ex parte*. *Frow v. De La Vega*, 15 Wall., 552. After the affirmance of the decree of the circuit court by the Supreme Court, the case, as far as it concerned Alexander, was just as effectually disposed of as if the bill had been dismissed as to him. Now the petitioners, Mrs. Bryan and Mrs. Nabors, are authorized to make application for such order and relief as they may be entitled to ask on the principles of the decree in the main cause. That decree held Horn liable, but discharged Alexander. The petitioners are, therefore, entitled to ask a decree only against Horn, for such sums, respectively, as they may show themselves entitled to. They have no remedy against Alexander, because the court, in the main cause, made no decree against him. As soon as the case got beyond the reach of amendment by the affirmance of the decree of the circuit court, Alexander was effectually out of court, and the petitioners could have no relief against him, save by a new suit.

Whatever decrees, therefore, are rendered in favor of the petitioners, must be against Horn alone.

It remains to consider the exception filed by Horn to the master's report.

The first exception is to the allowance of interest on the decrees of May 21, 1860, and of May 2, 1864, in favor of Mrs. Bryan.

But the decree in the main case allowed interest against Horn, in favor of the original complainants. The opinion of the court was that the investment made by Horn, as alleged in his answer, of the funds of the estate in confederate states bonds, and their deposit by him with the probate judge, was no payment, and did not effect the discharge of Horn from his liability. He still owed the amount of the decree of the probate court, and was, of course, liable to the payment of interest thereon.

The fact which Horn alleges, by affidavit, that he received no interest, does not excuse him from the payment of interest.

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He was chargeable with interest from the date of the decrees until they were paid. He cannot excuse himself from the payment of interest by showing that he invested the fund in confederate bonds, from which he received no interest. Such an investment does not discharge the principal, as this court has already decided, and it does not, therefore, discharge the interest.

It is claimed, as an additional reason why no interest should have been allowed Mrs. Nabors, that the will of John Horn provided that if she should die childless the bequest to her should go to her brothers and sisters, and her present or future husband should have no part in it. It is, therefore, insisted by Horn that he could not, with safety, pay the money to Mrs. Nabors or into the probate court, until she had secured the same to the parties entitled thereto, in case she died childless. No reason is perceived why he could not have safely paid the fund into the probate court. Such a payment would have exonerated him completely. He failed to do this. He kept the money himself, and he is, therefore, properly chargeable with interest.

Exception is taken by Horn to the allowance by the master, to Mrs. Bryan, of \$2,700, the amount of the decree of May 21, 1860, because that decree had been settled and closed by a proceeding by her and her husband, in the probate court of Marengo county, Alabama, and the appeal therefrom to the Supreme Court.

The proceeding of Mrs. Bryan and her husband, as appears by the report of the case in 42 Ala., 496, was a motion made to the probate court in 1867, to revise and amend the decree of 1860. The Supreme Court decided that, after the final settlement in 1864 by the executor of the estate, the jurisdiction of the probate court ceased, and that the party's remedy, if he had any, was in chancery.

This, clearly, cannot be considered as a final disposition of the rights of Mrs. Bryan, under the decree of 1860.

The master disallowed the claim of Horn against Mrs. Bryan for board for herself and children, and of the sum of \$276 paid Modawell.

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These disallowances of the master seem to be sustained by the evidence. At all events, the presumption is in favor of the conclusions of the master, and nothing has been advanced to convince the court that the master has erred in these disallowances. They will not be disturbed unless shown to be erroneous. The same remarks apply to the exceptions filed by Mrs. Bryan.

The result is, that all the exceptions taken by Horn to the report of the master, and also the exceptions taken by Mrs. Bryan, must be overruled.

There will be decrees entered in favor of Mrs. Bryan and Mrs. Nabors, against John A. C. Horn, for the sums found due to them respectively. The petitions, so far as they concern Alexander, will be dismissed.

It may be well to add, that the taking of decrees *pro confesso*, on the petitions filed by Mrs. Bryan and Mrs. Nabors, and the filing of answers to such petitions, setting up objections to the claims made in the petitions, was an unnecessary and improper procedure. It is not the practice in equity, after final decree, to institute a new train of pleading. The only purpose to be subserved by filing petitions is to bring the claim of the petitioners before the master. All objections to the relief sought by the petition should be made before him.

THE UNITED STATES V. GODBOLD AND CLEVELAND.

The statute of limitations of six years (sec. 786, Revised Statutes), does not apply to suits brought on marshal's bonds by the United States.

This was a suit upon the official bond of Cade M. Godbold, late marshal of the United States, and William F. Cleveland, one of his sureties. The bond was executed June 3, 1854.

The defendants interposed the plea of the statute of limitations of six years (sec. 786, R. S.), to which plea the plaintiff demurred.

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Messrs. E. S. Daryan and Wm. Boyles, for the defendants, cited: *Green v. U. S.*, 9 Wall., 655; *U. S. v. Herron*, 20 Wall., 251; Story's Com. on Con., 3d vol., 593; *U. S. v. Union Pacific R. R. Co.*, 91 U. S., 72.

Mr. George M. Duskin, U. S. attorney, for plaintiffs, cited: *Dox v. P. M. General*, 1 Peters, 318; *Smith v. U. S.*, 5 Peters, 292; *U. S. v. Knight*, 14 Peters, 301; *Savings Bank v. U. S.*, 19 Wall., 227; *U. S. v. Herron*, 20 Wall., 251.

BRUCE, District Judge. This is an action brought upon the official bond of a United States marshal. A breach of the bond is alleged to have taken place. Among other pleas is the statute of limitations of six years, which is found in section 786 of the Revised Statutes, and in these words: "No suit on a marshal's bond shall be maintained, unless it is commenced within six years after the right of action accrues, saving, nevertheless, the rights of infants, married women and insane persons, so that they sue within three years after their disabilities are removed."

The question is, do suits instituted by the United States come within the influence of this section. The language is broad, and does not in terms except suits brought by the United States, and we must give the words their meaning, unless there is some principle upon which we can exclude the United States from the operation of the words, and from which we can justly conclude that congress, in enacting this section, did not intend to include suits by the United States, and did not include them in the broad language of section. The district attorney invokes the maxim, "*Nullum tempus occurrit regi*," which is that time does not run against the sovereign power.

In the case of the *United States v. Herron* (20 Wall., 251), the principle is thus stated: "That the sovereign authority of the country is not bound by the words of a statute, unless named therein, if the statute tends to restrain or diminish the power, rights or interests of the sovereign."

Now, the United States is not named in this statute, and

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under the rule of construction just stated, we must conclude that the United States is not bound by it, and that the congress, acting in view of this rule of construction, did not intend, in the use of the language, to include the government of the United States. But it is contended that the congress, in the enactment of the statute, had exceptions in view, and named the exceptions, to wit: infants, married women and insane persons, who might sue in three years after their disabilities were removed, and that, therefore, if congress had intended to except the government of the United States, it would have named it among the exceptions.

It is true that enumeration is exclusion, because, when exceptions to a general rule are enumerated, it is a fair inference that no other exceptions are intended. It is to be observed, however, that the section of the Revised Statutes in question, together with the sections preceding it, are taken almost *verbatim* from an act relating to marshals' bonds, of April 10, 1806: 2 Stat., 374.

It will be seen by an examination of this act, that its purpose was to afford persons who might be injured by a breach of the condition of a marshal's bond, a remedy by suit upon the bond. The second section of the act, which is carried into the Revised Statutes as section 784, gives the right to any person injured to institute and maintain a suit in his own name and for his sole use upon the bond; and section three, which is section 785 of the Revised Statutes, provides for repeated actions until the whole penalty is recovered; and then follows section four, which is section 786 of the Revised Statutes, now under consideration.

This review of the act of 1806, the provisions of which we find in the Revised Statutes as stated, shows the purpose of the act to have been to give a remedy in their own names to persons who might sustain injury by reason of the breach by the marshal of the conditions of his bond, and to limit the time within which the remedies might be pursued. The statute nowhere refers to suits by the United States, and section four must be held to refer to the same subject matter to which the other sections refer, to wit, the remedies by suit

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of injured persons upon the marshal's bond, and could not, therefore, have been intended by congress to impose any limitation upon the rights or remedies of the United States.

The demurrer is sustained.

THE DEPOSIT SAVINGS ASSOCIATION OF MOBILE v. D. H.
MARKS ET AL.

Where a state bank, or state banking association, uses for circulation and pays out its own notes, such notes are liable to the tax of ten per cent imposed by section 3412 of the Revised Statutes.

By section 3412 of the Revised Statutes of the United States, being a re-enactment of the sixth section of the act of March 3, 1865, as amended by act of July 13, 1866, it is provided that every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of notes of any person, or of any state bank or state banking association, used for circulation and paid out by them.

By the agreed state of facts in this case, it appeared that the plaintiff was an incorporated body, organized under a charter granted by the general assembly of Alabama; that the plaintiff was engaged in the business of receiving deposits and dealing in exchanges, and in the general business of banking, as authorized by said act, and that it was a bank or banker in the sense and meaning of section 3407 of the Revised Statutes of the United States, and that while engaged in such business, and between the 11th day of October and 13th November, 1873, the plaintiff issued a large amount of its own paper, in this form :

	" DEPOSIT SAVINGS ASSOCIATION OF MOBILE,	
2	ALABAMA.	2
	" MOBILE, <i>January 1st, 1873.</i>	
	<i>Will pay to bearer</i>	
	TWO DOLLARS	
B	<i>On return of this voucher.</i>	B
	" L. C. FRY, <i>Cashier.</i>	M. S. FOOTE, <i>President.</i> "

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That these notes were of the denominations of one, two, three, five, ten, twenty and fifty dollars, and that it paid them out to depositors and others who offered other currency or valuable consideration in exchange, and that during that time such papers circulated as money. Also, that the plaintiff was assessed by the internal revenue commissioner \$40,000 on the assessment list for November, 1873, this amount being ten per cent of the amount paid out by the plaintiff between October 11, 1873, and November 30, 1873. The collector of internal revenue at Mobile, by virtue of said assessment, issued his warrant of distraint against the plaintiff, and seized the sum of \$6,725.50 in money, and certain real estate of the plaintiff, which was sold according to the revenue laws in such cases, and bid off by the United States, to whom a deed for said land was made according to the provisions of said laws.

The plaintiff duly appealed, and the decision on the appeal sustained the tax and sale.

Messrs. Thos. H. Herndon and John Little Smith, for plaintiff.

Mr. Geo. M. Duskin, U. S. attorney, for defendants.

BRADLEY, Circuit Justice. This action is brought to recover back the said real estate, on the ground that the assessment, being upon the plaintiff's own issues of paper, was illegal, and that the seizure and sale of the lands were also illegal.

It is contended by the plaintiff that there was another tax of one per cent per annum on its own issues, and that the tax of ten per cent imposed by section 3412 was intended to be imposed only upon the amount of the issues and paper of other banks paid out by it, and used as circulation.

We think that this interpretation is untenable. The words of the law are plain and obvious, and we think the intent was equally so. That intent evidently was to discourage the issue and use of a paper currency other than that which was provided by the government, by the legal tender currency issued by it, and by the notes and bills of national banks. If a state bank were only taxed on its issues, as such, it would be on an entire equality with the national banks. But the

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words of the section are plain and unmistakable. The tax of ten per cent is imposed "on the amount of notes of any person, or of any state bank or state banking association used for circulation and paid out" by any bank, or banking association. To construe this as meaning notes other than its own issue would be to interpolate an exception in the law, which is not found in it, and which would tend to defeat its object if it were found in it. The entire argument to the contrary is inferential, and, in our judgment, insufficient to change the plain meaning of the words. We do not think it necessary to discuss the argument of the plaintiff in detail. We have examined it fully, and have no doubt of the conclusion to which we have come.

Judgment must be for the defendant, with costs.

KIMBALL & SLAUGHTER V. THE COUNTY OF MOBILE.

1. The legislature of a state has authority, by legislative act, to compel a county, against its will, to levy and collect a tax for the improvement of a river or harbor within the county limits, and in which the county is vitally interested, although other counties and the state at large may also derive benefit from the improvement.
2. When a bill is dismissed, without prejudice, the complainant is not barred from bringing a new bill against other parties on the same claim, or against the same parties, on new or additional facts.
3. The legislature of Alabama passed an act creating a harbor board, with authority to contract for the improvement of Mobile harbor, and requiring the authorities of the county of Mobile to issue to said harbor board the bonds of the county, to an amount not exceeding one million of dollars, to pay for said improvement. The harbor board made a contract for work on the harbor, to be paid for in county bonds. The work was performed by the contractors, and on settlement there was found due to them six county bonds of one thousand dollars each. The act creating the harbor board was repealed, and the board could not demand or receive from the county authorities the bonds to pay this obligation. *Held*, that the bill in equity of the contractors, against the county, to compel the delivery directly to them of the bonds, was well brought, and that a court of equity had jurisdiction of the case.

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4. The rights of the contractors could not be impaired by the repeal of the law creating the harbor board, or any other legislation enacted after the date of their contract.

IN EQUITY. Heard on pleadings and evidence for final decree.

On February 21, 1860, an act was passed by the Alabama legislature, entitled "An act for the improvement of the bay and harbor of Mobile." The first section of the act provided that the collector of customs for the port of Mobile, and the president of the board of revenue for the county of Mobile, and their successors in office, were thereby appointed *ex officio* a board for the purpose of causing the bay and harbor of Mobile to be deepened and improved, which board should be styled the Board of Harbor Commissioners, etc. The fourth section of the act provided that the said board, in the performance of its powers and duties under the act, should be a body corporate, and the president of the commissioners of revenue of said county of Mobile, was thereby authorized and required, from time to time, and as the same might be called for by said board of harbor commissioners, to issue the bonds of the county of Mobile, with the coupons attached for annual interest, payable semi-annually to bearer, etc., and the same should be handed over to said board of harbor commissioners, to be sold, and the proceeds to be applied to said work, as its necessities might require, and as authorized by the act, provided the whole amount should not exceed eight hundred thousand dollars.

The war prevented any steps, under this act, for the improvement of the bay and harbor of Mobile.

After the war, to wit, on February 16, 1867, an act was passed and approved, entitled "An act to provide for the improvement of the river, bay and harbor of Mobile."

This act declared that the president of the court of county commissioners of revenue of Mobile county, the mayor of Mobile, the president of the bank of Mobile, the president of the Mobile Chamber of Commerce, and one citizen of the county of Mobile, to be appointed by the governor of the state, and their successors in office, were thereby constituted

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a board for the improvement of the river, harbor and bay of Mobile.

Section two declared that the president and commissioners of revenue of Mobile county were thereby required to issue bonds to the amount of one million of dollars, to be issued and made payable as they might deem proper, to be delivered to said board for the improvement of the river, harbor and bay of Mobile, whenever they might require them; and said court were required to levy and cause to be collected such tax as might be deemed proper to pay such bonds.

The third section declared that, "said harbor board are hereby authorized to receive such bonds and apply them, or the proceeds of them, to the improvement, etc., of the river, harbor and bay of Mobile, or any part thereof," etc.

By section four it was provided that said harbor board should be vested with the like powers as were conferred by the said act, approved February 21, 1860, etc., and subjected to, and held liable to the duties, penalties and punishments provided for in the fifteenth section of said act.

Under the provisions of this act the harbor board was organized, and on June 24, 1872, entered into a contract with the complainants for the dredging, by the latter, of a channel through Dog river bar, in the bay of Mobile. They were to commence the work by the first day of August, 1872, and complete it on or before June 1, 1873. The harbor board agreed, by said contract, to pay complainants forty-nine cents per cubic yard of material excavated and removed, and to make payments as the work progressed. The complainants agreed to receive their compensation for said work in bonds of the county of Mobile, issued under said act of February 16, 1867, at the rate of eighty-two and one-half cents on the dollar.

The complainants completed their work, under said contract, on March 15, 1873, and it was approved and accepted on the 16th, by the engineer of said harbor board. At that date there were due them seventeen bonds of \$1,000 each on their said contract.

On June 5, 1873, a committee, appointed by the harbor

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The argument is that the improvement of the bay and harbor of Mobile is a matter which interests not only Mobile county, but also many other counties of the state, and also the people of other states and even of foreign countries; that the improvement of harbors is a matter of national concern, and it is the duty of the general government to provide for it; that while the power of the legislature to authorize the county, if it so elected, to issue bonds for the improvement of the bay and harbor is not denied, yet the power of the legislature to compel the county *nolens volens* to issue its bonds for such a purpose is disputed. It is insisted that this act of the legislature was not only unjust and oppressive, but that it did not provide for taxation in any proper constitutional sense. It was taking the money of one corporation and giving it to another. It was merely confiscation and robbery under the false name of taxation; that such an act could not be supported under the taxing power, and was beyond the power of the legislature.

In support of this view, counsel have cited Cooley on Con. Lim., p. 214, and note 2, p. 230; n. 1, pp. 235, 487, 488, 490, 491, 493; Cooley on Taxation, 482, 483, 487, 495; Illiard on Taxation, pp. 12, 14, secs. 17, 18.

So far as the act under consideration is charged to be unjust or oppressive, that is a matter with which this court had nothing to do. It cannot amend or modify legislative acts or annul them because they seem to be harsh or unjust: *License Tax Cases*, 5 Wall., 462.

On the question of the power of the legislature to pass the act under discussion, it may be conceded that the legislature has no power against the will of a municipal corporation to compel it to contract debts for local purposes in which the state has no concern, or to assume obligations not within the ordinary functions of municipal government. This seems to be the extent to which the authorities cited by defendants go. But the work for which the county of Mobile was required to issue bonds was one in which the state, and especially the county of Mobile, were interested, and it was clearly within the scope of the purposes for which the county was organized.

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“Counties, cities and towns exist only for the convenient administration of the government. Such organizations are instruments of the state to carry out its will. When they are authorized or directed to levy a tax to appropriate its proceeds, the state, through them, is doing indirectly what it might do directly. It is true the burden of the duty may thus rest upon a single political division, but the legislature has undoubted power to apportion a public burden among all the tax-payers of the state, or among those of a particular section. In its judgment those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an alms-house, or a hospital. It is not unjust, therefore, that they alone should bear it:” *Railroad Company v. County of Otoe*, 16 Wall., 667.

So in *United States v. Railroad Company* (17 Wall., 322), the Supreme Court says: “This power (to issue bonds to raise money in aid of a railroad) was conferred on the city of Baltimore, because its exercise concerned the public and to benefit the public. This power could no doubt have been imposed upon the city as a duty, and its exercise directed without the assent, or against the wish, of the corporation or its citizens. The state could do it directly on behalf of the city and without its intervention. The state is itself supreme, and needs no assent or authority from the city. It is not perceived that the act is less public and municipal in its character than if the state had compelled the city to levy the tax and to make the appropriation of the proceeds to the railroad company.

These authorities, it seems to me, effectually dispose of the objection that it was not within the legislative power to compel the county of Mobile to issue its bonds for the improvement of a river and harbor within her own limits and in which she was deeply and vitally interested. See, also, 46 N. Y., 401; 47 N. Y., 608; 57 N. Y., 188; *Blanding v. Burr*, 13 Cal., 343; *The Town of Guilford v. The Supervisors of Chenango Co.*, 3 Kernan, 143; *Stewart v. The Supervisors of Polk Co.*, 30 Iowa, 9; *Augusta Bank v. Augusta*, 49 Maine, 507.

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We may, therefore, assume it as settled that the act of February 16, 1867, is not obnoxious to any provision of the constitution of Alabama in force when it was passed, and is within the general scope of legislative power; in other words, that it is a valid and binding enactment.

Under authority of this valid law the harbor board entered into a contract with the complainants for certain work, the work was performed according to the contract, it is conceded that the balance claimed by the complainants is due them, and it follows from these facts that there should be a decree in favor of complainants for such balance unless some obstacle is presented by other facts in the case which preclude such a decree.

It is alleged, by way of defense to the bill of complaint, that a bill between the same parties as are complainants and defendants in this suit, setting up the same identical cause of action, was dismissed on appeal by the Supreme Court of Alabama, and that the questions raised by the present bill are *res judicata* and cannot be again litigated.

This defense cannot hold: 1. Because it is not set up in the answer; and, 2. There is no proof to sustain it. On the contrary, it appears that the case here made is different in essential particulars from that made in the case dismissed by the state court, and that the state court dismissed the bill of complainants without prejudice. They were, therefore, at liberty to bring a new bill against different parties on the same claim, or against the same parties on new or additional facts. It is alleged, and appears to be true, that the present bill does contain material averments, for want of which the bill in the state court was dismissed.

For these reasons the defense of *res adjudicata* cannot prevail.

It is further set up, by way of defense, that there is an adequate remedy at law, and that this court is, therefore, without jurisdiction. If this objection can be maintained, it would be the duty of this court to dismiss the bill. It is, therefore, necessary to consider the question whether the

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complainants have a remedy at law against the county of Mobile.

In the case of *Mobile County v. Kimball & Slaughter* (54 Ala., 56), the law of February 16, 1867, under which the harbor board was organized, was construed. This court is bound to follow that construction, as much as if it were a part of the law itself: *Mitchell v. Lippincott*, 2 Woods, 467, and cases there cited.

In that case the Supreme Court of Alabama held: "The harbor board was a body created by the general assembly, and not an agent appointed by the county of Mobile. Its authority, as well as its existence, was derived through the state from the state. It was with this board that complainants made their contract, upon which their suit was founded, and it is not shown or alleged that the amount of bonds it had received was insufficient to enable it to fulfill its engagements. Manifestly, therefore, their controversy should have been with the harbor board, and not with the county of Mobile."

"The only obligations imposed on the county, and incurred by it, were that it should issue its bonds upon demand of the harbor board, and pay them according to their stipulations to the lawful holders thereof. If the court of county commissioners refused, on such lawful demand, to issue bonds, or if the harbor board, after procuring the work to be done, failed to perform, or was disabled from performing its duty of demanding from the county its bonds to a sufficient amount to pay the contractors, it is probable a case would be made for the interference of a court, and its coercive operation on the county authorities in favor of the contractors in a suit brought by them."

This construction of the law by the Supreme Court shows that the complainants had no contract with the county of Mobile, for it is decided that the harbor board was not the agent of the county, but of the state. No suit at law upon the contract would lie against the county. The obligation of the county was to issue its bonds on the demand of the harbor board. This obligation was imposed, not by any con-

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tract between the county and the complainants, but by the law. If an action at law had been brought against the county on the contract made by the complainants with the harbor board, the county could have answered that it never made such a contract, and the complainants would have been put out of court.

The case is clearly one of equitable cognizance. It is to compel the county to issue and deliver to the complainants its bonds, in conformity, not with any contract, but of an obligation imposed by a law of the state. The contract of complainants was with the harbor board. The compensation was to be made in bonds of the county, to be issued on demand of the harbor board.

There is due to complainants six bonds of the county of \$1,000 each, for work performed under this contract. The harbor board has been destroyed by an act of the legislature. It cannot, or does not, demand the bonds from the county necessary to pay the complainants' claim. A court of equity can alone take the place of the harbor board, and require of the county to issue and deliver to complainants its bonds in payment of their claims.

It is entirely clear that an action at law against the county would be futile. Judge Story, in his work on Equity Jurisprudence, vol. iii, sec. 1250, says: "Another class of implied trusts, which may be mentioned under this head, is that which arises under contract, or otherwise, by operation of law from a claim which may be directly enforced by law against the party, but to the due discharge of which another party is ultimately liable."

"In such a case, a court of equity treats it as a trust by the party ultimately liable, which may be directly enforced in favor of the party ultimately entitled to the benefit of it. In other words, a court of equity will render the party immediately liable who is or may be at law or in equity ultimately liable."

"Thus, if a trust is created for the benefit of a party who is to be the ultimate receiver of the money, or other thing, which constitutes the subject matter of the trust, he may

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sustain a suit in equity to have the money or other thing directly paid or delivered to himself." The text is sustained by the following citations: *Foster v. Foster*, 3 Bro. Ch. R., 489, 493; *Tew v. Winterton*, 1 Ves., Jr., 451; Sugden on Vendors, ch. 15, sec. 4, pp. 633, 634 (7th ed.); 1 Madd. Chy. Pr., 471, 472.

It seems to me that the present case is an excellent illustration of the principle laid down by Judge Story.

The jurisdiction of a court of equity, under the circumstances of this case, appears to me to be undoubted. But it is said that the statute law of Alabama affords a method of relief to the complainants by the prosecution of the claim against the county, etc.

But if the case is one of equitable cognizance, no statute of Alabama can deprive the equity courts of the United States of their jurisdiction over it.

Of course, the complainants would be required, if the statute law of the state so prescribed, to present their claim to the board of county commissioners, and to bring their suit within the time limited by the state law, but having presented their claim, and thus laid the foundation of their suit, if the case was one proper for a court of equity, they had the right, being citizens of a state other than the state of which the defendant was a citizen, to resort to the equity courts of the United States. No law of Alabama, providing another forum or another method of procedure, could deprive the complainants of their rights under the constitution and laws of the United States, or circumscribe the jurisdiction of the equity courts of the United States: *Bennett v. Butterworth*, 11 How., 669; *Thompson v. The Railroad Companies*, 6 Wall., 134; *Case of Broderick's Will*, 21 Wall., 503; *Noyes v. Willard*, 1 Woods, 187; *Benjamin v. Cavanac*, 2 Woods, 168.

The act of February 23, 1860, which is quoted in full above, was an unnecessary enactment. It did not enlarge the rights of complainants, nor add aught to the jurisdiction of this court as a court of equity. The case of complainants is

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just as good without as with it, and the power of this court to grant relief is not changed by it.

The only question which remains is, whether the complainants have sustained, by proof, the averments of their bill, that after the passage of the act of April 19, 1873, which repealed the act of February 16, 1867, under which the harbor board was organized, said board had no money with which to pay complainants, and no bonds of the county of Mobile, except such as had been hypothecated, and that on and after July 29, 1873, said harbor board had no money or bonds with which to pay complainants' claim, or any part thereof, and has none now. If this is established, the case is made which it is intimated by the Supreme Court of the state would compel the county to issue bonds to pay the debt due complainants.

There is no averment in the answer of Mobile county, nor any hint in the evidence of any corrupt or fraudulent conduct in the administration of the county's means by the harbor board. It is not asserted that the bonds or funds of the county were misapplied or fraudulently appropriated.

On the question, what means had the harbor board for the payment of its liabilities after it stopped work? Mr. Percy Walker, its secretary, says: "The board had, I believe, no money at its command when it stopped work, and was indebted to officers for salaries, nor did it have any bonds in its possession or under its control, after April 19, 1873, unless it was as follows: In July, 1873, Mr. Walsh returned from New York forty-two of the bonds, of which the county redeemed thirty-one, and Mr. Price, president of the harbor board, delivered the remainder (eleven) to Kimball & Slaughter, or their agent, on account of their work. The money paid to the county for the thirty-one bonds, was, with the exception of a small sum (\$400), applied to the payment of the balance due to the Ninth National Bank of New York."

The pleadings and evidence make it clear, that when the harbor board ceased operations, they owed to the complainants six bonds, of one thousand dollars each, of the county of Mobile, for work done under contract, made while the act of

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February 16, 1867, was in undisputed force, and that the harbor board had then no means to pay this obligation, and has none now.

The claim of the complainants to call upon the county of Mobile to issue and deliver bonds, sufficient to satisfy said obligation, seems to be complete.

It is hardly necessary to observe that no legislation passed after the contract between the complainants and the harbor board had been made and had been performed by complainants and the performance accepted, and the rights of complainants had been thus fixed, can have any effect to impair or abridge the rights of complainants.

The two acts of April 19, 1873, cannot, therefore, have the slightest influence on complainant's rights. Their rights remain just as if those acts had never been passed.

It results from these views, that there must be a decree for complainants, against the county of Mobile, for the delivery to complainants of six bonds of \$1,000 each, or for their money value, at eighty-two and one-half cents in a dollar, with interest from March 15, 1873.

WILLIAM BUTLER DUNCAN AND A. FOSTER ELLIOT, TRUSTEES; v. THE MOBILE & OHIO RAILROAD COMPANY ET AL.; MORRIS KETCHUM, TRUSTEE, v. THE MOBILE & OHIO RAILROAD COMPANY ET AL.; D'ORELLI ZEIGLER ET AL. v. THE MOBILE & OHIO RAILROAD COMPANY ET AL.

1. In the administration, by a court of equity, of a common fund subjected to the equal benefit of many creditors, if one creditor objects to the claim of another, and succeeds in showing it to be invalid, such claim does not stand good as against other creditors who interpose no objection to it. The opposition of one inures to the benefit of all.
2. If other creditors expressly waive all objection to such claim, and consent that it shall participate in the fund, such waiver and consent can only affect the proportion of the fund to which they would be entitled if the disputed claim were excluded.

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8. A banking firm in New York was the financial agent of a railroad company, was interested in its capital stock, in various classes of its securities, and its floating debt. The head of the firm was president of the railroad company, invested with full control of its financial affairs. The company being in a failing condition, and unable to pay the coupons about to fall due on its first mortgage bonds, said banking firm, with the concurrence of the railroad company, in the hope of preserving the credit of the latter, and if its resources should continue to be inadequate to pay the interest on its bonds, with the purpose of instituting proceedings to administer the mortgage property for the protection of the bondholders, agreed to purchase and hold said coupons: *Held*, that there was nothing in the relations between the banking firm and the railroad company which forbade this arrangement. The banking firm was only bound to observe good faith.
4. Where said banking firm had made a temporary loan to the railroad company, to enable it to pay interest on its maturing coupons, this constituted a confidential debt which the banking company were justified in repaying to itself out of the earnings of the company, the company not objecting.
5. A railroad company pledged its earnings for advances obtained by its president to pay its semi-annual interest. *Held*, that this pledge of the earnings was made for the security of the president, and did not prevent him from paying other debts with such earnings, if he found it expedient and for the company's interest to do so.
6. Possession of uncanceled coupons, detached from negotiable bonds, is *prima facie* evidence of title, with all the rights of purchaser.
7. There could be no sale of such coupons unless there was an intent on the part of the holder to sell.
8. Such intent may be inferred when the holder has actual notice that purchase, and not payment, was intended by the other party, and, having such notice, he consents to take his money, or if, after such notice, he acquiesces in the transaction.
9. The circumstances stated, which, in this case, were held to amount to notice, were sufficient to put the party on inquiry.
10. Although such circumstances may not be sufficient notice to bind the party absolutely to a contract of sale, yet, if he fails to repudiate the contract and return the money, he will be bound.
11. Coupons severed from negotiable bonds, secured by a mortgage on the property of a railroad company, are not entitled to priority of payment over the principal of the bonds or the coupons subsequently maturing, unless the mortgage contains some provision to that effect.
12. When a common fund is equally liable as a security for various claims, it can only be administered for the benefit of all, and this whether the claims have matured or not.

Before BRADLEY and WOODS, JJ. These suits were insti-

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tuted for the common purpose of securing a sale of the railroad and other property of the Mobile & Ohio railroad company, covered by the first mortgage executed by the company.

William Butler Duncan and A. Foster Elliott; the complainants in one bill, claimed to be the trustees of the said first mortgage; Morris Ketchum, the complainant in another of the cases claimed to be the sole trustee under said mortgage.

By consent of parties, and by the order of the court, the three cases were consolidated, and were then concurrently heard upon the pleadings, evidence, reports of master, exceptions thereto, exhibits, etc., for final decree.

The main controversy in the cases was touching the coupons due May and November, 1874, on the first mortgage bonds.

These coupons, amounting, without interest, to \$535,106.74, were propounded before the master by Alexander Duncan, who claimed to be their holder and owner. He averred that they had been purchased at the dates of their maturity, respectively, by Duncan, Sherman & Co., of New York, and that he was their transferee, and that the coupons were outstanding and unpaid, and a lien upon the property covered by the first mortgage executed by the railroad company, and entitled to payment out of the proceeds of its sale. The claim of Alexander Duncan was contested before the master by one Belloni, a first mortgage bondholder, who claimed that the coupons held by Alexander Duncan had not been purchased by Duncan, Sherman & Co., but had been paid by them for the company, and with the company's means. The master found for Alexander Duncan, and reported that the coupons held by him were unpaid, and constituted a just and lawful claim, and should be allowed, with interest from their maturity, as a valid and subsisting lien of the same force and effect as other unpaid coupons of the first mortgage bonds.

Exceptions were filed by the contesting bondholders to this part of the master's report, and the question thus raised was argued by counsel and decided by the court.

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It was claimed further in behalf of Alexander Duncan, that as the coupons held by him fell due before any other unpaid coupons, and before the bonds to which they belonged, he was entitled to priority of payment out of the proceeds of the mortgaged property.

Messrs. John A. Campbell, J. A. Garfield, Peter Hamilton and F. N. Bangs, for complainants in the first-named case, and for Alexander Duncan.

Mr. George N. Stewart, for the Mobile & Ohio railroad company.

Messrs. Wm. G. Jones, George Hoadly, E. H. Grandin and E. L. Andrews, for other defendants and contestants.

BRADLEY, Circuit Justice. In the case of the Mobile & Ohio railroad company, in which the various suits were consolidated, we have given the subject discussed a good deal of consideration, and have prepared the following opinion:

The consolidation of these cases by agreement of the parties has relieved us from the necessity of deciding between the conflicting claims of the two sets of trustees. Both being before the court, as well as the parties beneficially interested, we can make a decree by which a sale of the mortgaged property will be valid, and confer a good title. We are also relieved from making any adjudication in reference to the claim of priority of the Tennessee substitution bonds, which, by like agreement of the parties, is submitted to the consideration of another court.

The only question of importance remaining in the causes as now consolidated is, whether the interest coupons which became due in May and November, 1874, on the first mortgage bonds, are valid and outstanding securities, entitled to payment out of the proceeds of the mortgaged premises *pari passu* with the bonds from which they were severed, or even prior to said bonds, or whether they are to be deemed to have been paid and satisfied. The holder of these coupons (they not having been canceled) contends that they were purchased from the original holders thereof, and were not paid, and that by virtue of such purchase he is entitled to the full benefit of

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the mortgage security, and even to priority of payment over the coupons subsequently maturing, and over the principal of the bonds; and if not entitled as purchaser, that he is at least entitled to be subrogated to the rights of the original holders, as if the coupons had never been paid.

The coupons in question were regularly presented for payment at the proper places appointed for that purpose, at or soon after the time when they became due; but the money due thereon was not received by the parties holding the same in the usual manner, at the place of presentment; but, after being examined, they were inclosed in a sealed envelope and indorsed with a memorandum of the number and amount, and returned to the holder or his agent, with directions to present them at some neighboring banking house, where they would get the money. It is claimed that they were not paid by the railroad company, but that Duncan, Sherman & Co. advanced the money on them with intent to hold them as subsisting securities, and that the holders consented thus to dispose of them. Parties contesting the validity of the coupons as an outstanding claim insist that they were in fact paid by the company or with funds procured by it for the purchase, and that the holders did not consent to a sale of them, and that Duncan, Sherman & Co., at all events, are estopped from setting up a claim to them as purchasers.

The right of the contestants to appear and oppose the claim of the present holders of these coupons is questioned. It is said that, having come before the master and proved their own bonds without making objection to the coupons which were also presented and proved before the master, they are now precluded from raising objections to them. The statement is not precisely accurate. One of the contestant bondholders at least did present objections before the master (which objections were adopted and presented by the complainants as trustees of the mortgage), and others have since been permitted to appear as defendants in the cause and file an answer, which they have done, raising the very issue. In addition to this, the trustees of the second mortgage filed an answer dis-

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puting the validity of the coupons. We think, therefore, that the issue has been distinctly and properly raised.

In the administration by a court of equity of a common fund subjected to the equal benefit of many creditors, if one creditor objects to the claim of another creditor and succeeds in showing it to be invalid, such claim does not stand good as against other creditors who interpose no objection to it. The opposition of one inures to the benefit of all. It questions the right to participate in the common fund. If the other creditors, not opposing the claim, expressly waive all objections to it as to themselves, and consent that it shall participate, such waiver and consent can only affect the proportion of the fund to which they would be entitled if the disputed claim were excluded. It comes in for a portion of their share by equal participation with themselves. This proposition is so obvious that it needs no argument to support it. Waiver of objections to a claim is no proof of its validity except as against those who make the waiver. The waiver filed in this case, therefore, cannot have the effect of proof that the coupons in question were purchased by Duncan, Sherman & Co., except by way of estoppel as against those who filed it. The questions raised by the contestants, therefore, are properly raised, and must be met; and in considering these questions, it is necessary to inquire into the precise position which Duncan, Sherman & Co. occupied towards the company.

It appears from the evidence that they had for some time previous to May, 1874, been the general financial agents of the Mobile & Ohio railroad company, and were interested in its capital stock and its various classes of securities, to wit: First mortgage bonds, second mortgage and other bonds, and also in its floating debt. They made the arrangements for the current funds necessary to meet its various liabilities from time to time; and, in short, may be said to have carried the concern for a considerable period. Wm. B. Duncan, the head of the firm, was for several years a director of the company, and in April, 1874, he became its president, and was invested with the most plenary control of all its financial

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affairs. By resolutions of the directors, adopted in April, 1874, after Mr. Duncan was elected president, he, as such, was invested with full discretion over the available securities held and owned by the company, in consolidated bonds, convertible bonds, first and second mortgage bonds and stock, and was authorized to sell or hypothecate the same; and the net earnings of the company were pledged for repayment of advances made by him for the purpose of meeting the May interest; and the consolidated bonds were pledged as a security for the floating debt. The truth is, the whole financial operations of the company were under the control and passed through the hands of Duncan, Sherman & Co., both in 1873 and 1874, and up to the time of its open suspension in May, 1875.

The resources which thus came into their hands were derived from the earnings of the road, the disposable securities and stock of the company, and the temporary loans that were made from time to time. It appears from the annual report of the company for the year 1874 (the year in question) that its net earnings for that year were \$708,000, and the sales of bonds (mostly convertible) amounted to \$94,000, making a total of \$802,000. The contestants, in this case, contend that these sums were sufficient to have kept down and paid the interest of the first mortgage bonds and most of the other outstanding bonds of the company. This is true. The annual interest of the first mortgage bonds (including the Tennessee substitution bonds), was about \$730,000, and of all the bonds together, about \$880,000.

But there was a large floating debt, which, at the close of 1873, amounted, according to the annual report for that year, to the sum of \$1,451,147.77, of which Duncan, Sherman & Co. held about \$191,000. They had, during the year, loaned to the company, on its notes, \$150,000, which had not been re-imbursed, and the balance due them on general account at the close of the year was over \$41,000. This loan was made to enable the company to keep up the payment of its interest and to meet its current obligations. The floating debt was kept along by renewals and by pledging various securities of

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the company as collateral. During the year 1874 it was reduced about \$282,000, and as a part of this reduction Duncan, Sherman & Co. reduced their own debt \$174,000, bringing it down to about \$17,000. That is, they re-imbursed themselves their temporary loan, with interest, amounting to \$160,000, and \$14,000 on their general account.

The contestants complain that this reduction ought not to have been made, especially so much of it as applied to the debt due to Duncan, Sherman & Co. They say that by the resolution of April, 1874, the earnings of the road were pledged for the May interest (which is the interest represented by one-half of the coupons in question), and that at all events this interest should have been paid. They also insist that the same considerations apply to the November interest. They contend that this was a specific appropriation of these funds, and that Duncan, Sherman & Co., occupying the fiduciary relations towards the company which they did, were bound in equity to carry it out, and had no right to assume the role of purchasers of those coupons. This position will presently be considered.

Besides reducing the principal of the floating debt as before mentioned, the sum of \$118,346 was absorbed in paying interest thereon, for the purpose of extending it and preventing the sacrifice of collaterals; the sum of \$139,296 was used to pay over-due coupons of the previous year, and \$128,000 to pay interest on convertible and other bonds; besides which, some of the assets were uncollected, amounting, in excess of what was realized from those of 1873, to \$47,726, and the sum of \$45,000 was paid on the Oktibbeha branch. These items together amount to \$478,368, and with the amount paid on the principal of the floating debt, made an aggregate of \$763,000. Various other claims in judgment, and otherwise, absorbed the balance. It is not pretended that any portion of the bonded interest accruing in 1874 (except as above stated) was paid by the company, unless the payment hereafter mentioned is to be regarded in that light. The only resources which the company had were actually disposed of as above stated.

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In this state of affairs, it was evident that the company was in a failing condition. Its net income from the road (which was its only real resource) was insufficient to pay the interest on its funded debt, to say nothing of the floating debt. The great mass of its property was primarily liable to its first mortgage bondholders. If subjected to an indiscriminate scramble of judgment creditors, the rolling stock and outside property would be sacrificed and scattered, and the whole security would be ruined. What was to be done? The first mortgage bonds were not due, and if the earnings were applied to the payment of the interest accruing on them, the bondholders could not take possession of the property, nor bring a suit for foreclosure. At the same time, other creditors were clamorous for every cent which could be realized. Duncan, Sherman & Co. conceived the idea of purchasing the coupons with their own funds, or funds provided by them for the purpose, perhaps in the hope of preserving the credit of the company until a change for the better should enable it to avoid ultimate bankruptcy. It is evident, moreover, that this would place it in their power, if the resources of the company should continue inadequate to redeem the coupons, to take proceedings for administering on the property for the protection of the bondholders, and of putting the company into a course of liquidation.

The mode of carrying out the plan of purchasing the coupons was this: Funds were furnished, or provided for, by Duncan, Sherman & Co., in some bank near the usual place of payment, for the purpose of taking up the coupons on their account. When presented for payment by the holders, the course pursued is stated by the master in his report, as follows:

“As to the mode and manner the evidence is very complete. For instance, the couponholders who presented them for payment at the company's office in Mobile, were handed back their coupons after they had been verified or counted by the treasurer or his assistant, and placed in envelopes indorsed with memoranda of the number and amounts, and the holders were told to take them to the bank of Mobile,

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where they would be paid. On presentation at said bank to the teller, the coupons were retained by the bank officer and the bank's cheques or money were given for them. The mode and manner of payment in London and New York was not the usual mode. In London the coupons for May, 1874, were taken up on instructions from Duncan, Sherman & Co. by the Union bank, and for November by the Credit Foncier. In New York, the evidence is that they were not paid in the usual manner, and that the holders were informed that they were being purchased, and held uncanceled.

* * * * *

"Evidence was adduced to show that a portion of the original owners did not know that the company was not paying. It appears that some did not know, and did not inquire. Others did and were fully informed. Payment was not made at the treasurer's counter as usual. It appears that all who inquired were informed of the nature of the payment. There was evidence to show that a written notice was posted up in view of the treasurer's office. The evidence is full that the purchasing agencies and the officers of the company fully understood the transaction. Evidence offered to show that the matter was kept secret, failed."

The master further finds, as follows:

"The proof is full as to the intent of Duncan, Sherman & Co., and their agents—the bank of Mobile, Credit Foncier, etc., with the assent of the company, not to pay or satisfy said coupons so as to extinguish them; but, on the contrary, their plainly expressed intention was that they should be purchased and remain uncanceled, with all the rights that purchasers would have. Their taking up the coupons without extinguishment was with the consent of the company, by the express agreement with its officers that they were to be purchased with all lien rights as existing mortgage security, preserved and held until the company could pay them."

These findings of fact have been excepted to by the contestants, but after a careful examination of the evidence, we think they are substantially correct.

Now, upon this state of facts several questions arise:

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First. Were Duncan, Sherman & Co. precluded from purchasing the coupons by the relation in which they stood to the company? We do not see that this can be successfully maintained. As financial agents of the company, and general managers of its pecuniary concerns (Wm. Butler Duncan being the chief executive officer), it is undoubtedly true that they were bound to preserve entire good faith. Had they been furnished by the company with the requisite means to pay the coupons, it would have been acting in bad faith towards it to have purchased the coupons in this manner, without the company's consent; and, under such circumstances, even to have purchased them with its consent, and kept them on foot, for the purpose of getting possession of the company's property, would have been a fraud upon other parties interested in that property. But the requisite funds were not furnished by the company. Money enough was furnished, it is true, to have paid these particular coupons, by leaving everything else unpaid. But the company was overwhelmed with floating debt, and creditors were pressing to be paid. Securities to a large amount had to be pledged as collateral to prevent instant prosecution, and debts had to be extended by payment of interest to prevent the sacrifice of the securities. Duncan, Sherman & Co. cannot justly be condemned for paying these pressing obligations as far as the money in their hands would go. Immediate bankruptcy would have resulted from a contrary course. It is true, the resolution of April pledged the earnings of the road for the advances obtained by the president for the purpose of meeting the May interest; but this pledge was only made for his security, and did not prevent him from paying other debts with such earnings if he found it expedient, and for the company's interest to do so. And even if the company could have insisted on such an appropriation, it did not, but assented to his purchasing the coupons instead of paying them.

As to Duncan, Sherman & Co. paying their own temporary loan to the company, it does not appear but that they had claims of the highest equity to be paid. They had made this loan to enable the company to pay its interest. It was a

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confidential debt for a loan made to relieve the company from its pressing embarrassments.

Secondly. Was the transaction, as it actually occurred, a purchase of the coupons? It is insisted by the claimant that his possession of the coupons uncanceled is *prima facie* evidence of his title to them, with all the rights of a purchaser. So it would be if the evidence did not disclose the exact nature of the transaction. Whilst he has possession we know how he got that possession, or, rather, we know how Duncan, Sherman & Co. got it, and it is conceded that the present holder, having obtained them after maturity, is affected by the consequences that attach to the transaction. If they were paid, he cannot hold them as unpaid. He has the same title to them which Duncan, Sherman & Co. acquired, and no greater.

Then was it a purchase? We are clearly of opinion that there was no purchase, unless there was an intent on the part of the original holder to sell. This is almost a self-evident proposition. And where, as in this case, a sale, as compared with payment, is prejudicial to the holders' interest by continuing the burden of the coupons upon the common security, and lessening its value in reference to the balance of the debt, the intent to sell should be clearly proved. Such an intent may be inferred, however, when the holder has actual notice that purchase, and not payment, is being made, and when having such notice, he consents to take his money. So the same result will follow if the holder acquiesces in the transaction, on being subsequently informed that payment was not made by the debtor company, but was made by a third party intending to purchase the coupons and keep them, subsisting and uncanceled. In such case the holder would undoubtedly have a right to repudiate the transaction, and demand possession of his coupons by returning the money received for them. But, not doing this, he will be presumed to acquiesce in their transfer.

In the present case many of the parties had actual notice of the nature of the transaction, and all who inquired were informed in relation to it. The circumstances of the pay-

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ment were calculated to excite inquiry. The coupons were not paid in the usual manner, by the officers or agents of the company, at the place designated for payment; but, after examination, were sealed up in an envelope, and the holder was directed to go elsewhere to get his money. At the place to which he was directed to go he received it, and delivered up his coupons. They were not delivered up to the company. This was an indication that they were not to be canceled. The great advantage to the holder of payment by the company would have been the cancellation of the coupons, so as to diminish the burden on the mortgage security. But he delivered his coupons to a third party, who furnished him the money for them. He ought to have known that that party, whether the bank itself, or some person by whom it was employed, and furnished with funds, would at least keep the coupons for its security until the company could pay them.

We think that this was notice to the holder, at least sufficient notice to put him upon inquiry. It may not have been, and we think it was not, sufficient notice to bind him absolutely to a contract of sale. He might still have repudiated the transaction by returning his money. But it was certainly sufficient to put him upon inquiry; and his subsequent acquiescence confirmed the title of Duncan, Sherman & Co., whose money he received. Had any other parties than Duncan, Sherman & Co. placed themselves in the gap as they did, and taken up the coupons with their own funds, hardly a doubt would have been raised as to their title to keep the coupons until they were re-imbursed.

In our judgment, therefore, Alexander Duncan, who obtained the coupons from Duncan, Sherman & Co., is justly entitled to hold them as subsisting demands against the mortgage security.

But the claim put forward, that these coupons are entitled to priority over the principal, and over coupons subsequently maturing, we regard as utterly untenable. This would be giving to coupons a far greater sanctity than justly belongs to them. They are created as a mere matter of convenience

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for collecting the interest. According to them, the additional quality of being severed from the bond, and of being passed from hand to hand, does not clothe them with any additional privileges prejudicial to the bond itself. They have no preference or priority over it, any more than unpaid installments of interest would have if there were no coupons to represent it. They all stand, as to the security, on the same platform of equality with the principal, unless the mortgage or deed of trust contains some provision to the contrary, which is not the case here (*Dunham v. Railway Co.*, 1 Wall., 254); and this is so whether the principal is due or not. It is suggested that the holder of the coupons may cause the mortgage to be foreclosed and the property to be sold to obtain payment. But he cannot do this to the prejudice of the principal. He must bring in the bondholders who are equally entitled to the benefit of the common fund. The latter are not obliged to stand by and see the entire security taken from them at the instance of the owner of the coupons. Where a common fund is equally liable as a security for various claims, it can only be administered for the benefit of all; and this, whether they have all matured or not. It is true, the bondholders themselves, when they have not parted with their coupons, or when an installment of interest or principal not represented by coupons, is due, may foreclose and sell the whole security for the satisfaction of the amount due, and thus deprive themselves of security for the residue of the debt. But that is because the matter is all in their own discretion, and no other person is injured by their acts. But it does not follow that the holder of separated coupons can do likewise. Equity will not allow him to pursue the entire security, or any part thereof, to the prejudice of other parties equally interested in it.

The conclusion to which we have come as to the right of Duncan, Sherman & Co. to hold the coupons by purchase, renders it unnecessary to discuss the question of subrogation, so ably argued by counsel. Whilst we are inclined to think that, as holders of junior securities, Duncan, Sherman & Co. would have been entitled to pay the coupons, and hold them

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by way of subrogation, we are not prepared to concede that this would have placed them on equality with the bondholders. No one can deprive the creditor of his security, or any part of it, without his consent, until his whole debt is satisfied. Sureties and others entitled to the privilege of subrogation, paying only part of the debt, must be postponed to the creditor until they are in a position to demand all his securities.

We observe that many exceptions have been taken to the report of the master and to his rulings, in the course of the examination before him, which we have not yet mentioned. We have examined these exceptions, however, but from the view of the case which we have taken, we do not consider them to be material.

A decree should be rendered in the cause in conformity with the views expressed in this opinion, that is to say, that Alexander Duncan is entitled to come in on an equal footing with the first mortgage bondholders for the amount of the first mortgage coupons held by him, including in the term "first mortgage bonds," all bonds which are ranked by the master in his report as belonging to the category of first mortgage bonds, such as ten year interest bonds, etc., so far as they represent coupons actually unpaid, excepting, however, the Tennessee substitution bonds, which are not passed upon by us, and are not to be affected by the decree, but which are to take their rank of priority according to the decision of the court which has cognizance of the controversy relating to said bonds; also, that the mortgaged premises should be sold as an entirety to pay and satisfy, first, the said first mortgage bonds and coupons, and then the other securities of the company in the order reported by the master, saving and excepting the rights of the holders of the Tennessee substitution bonds, as before provided. Also, that masters should be appointed to make the said sale and to execute the decree; and that the sale should be duly advertised by them, and fixed to take place on a day named; and that, upon such sale being made, first mortgage bonds and first mortgage coupons should be received in payment in

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place of cash, when tendered for that purpose, except a sum sufficient to pay the costs and expenses of the various litigations, and the expenses and compensation of the commissioners, reserving for further order the status of the said Tennessee substitution bonds, in respect to said sale.

Provision should also be made in the decree for executing all proper deeds and conveyances necessary to perfect the title; and all further equities and directions necessary to be made between the parties, or with regard to the mortgage fund, are to be reserved at the foot of the decree.

The counsel of the complainants in the original suit will prepare a draft of the decree, and submit it to the opposite counsel, before presenting it to the court, in order that if the terms be not agreed on they may be then settled.

Woods, Circuit Judge, concurred.

NOTE.—Affirmed by United States Supreme Court, 96 U. S., 659.

DECEMBER TERM, 1878.

EDWARD BALDWIN v. THE BRADISH JOHNSON.

1. The lien of a mortgage on a vessel, duly recorded according to section 4192, Revised Statutes, is inferior to all strictly maritime liens, but is superior to any subsequent lien for supplies furnished in the home port, given by state legislation.
2. A state cannot, by its legislation, create a lien upon a vessel which shall have priority over one already existing by virtue of an act of congress.
3. No court can, by rule, create maritime liens or change the order of existing liens.

ADMIRALTY APPEAL.

The Bradish Johnson was seized upon a warrant issued upon the libel of Edward Baldwin. Other creditors, some of whom had furnished supplies to the steamer in her home port, and others of whom held admiralty liens for seamen's wages,

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and for supplies furnished in foreign ports, filed libels. All the cases were consolidated, the steamer was sold by order of the district court, and the proceeds paid into the registry of the court.

Thereupon, under admiralty rules thirty-four and forty-three, Charles Cavanac, Jr., filed his intervention, claiming the proceeds of the steamer, after the payment of costs and the general admiralty liens, by reason of a mortgage upon said steamer, which, he averred, had been duly recorded according to the act of congress, before any other lien upon the boat had been created.

On March 11, 1876, one Vincent J. Wood, who was at that time the sole owner of the Bradish Johnson, sold her to J. M. Stone and J. H. Stone, citizens of Alabama, for the price of \$7,200, of which three thousand dollars were paid in cash, and the residue, \$4,200, was evidenced by the notes of the purchasers, which they secured by a mortgage duly executed on the boat. This mortgage was recorded in the office of the collector of customs of the port of Mobile, on April 18, 1876, and about that date the Bradish Johnson was enrolled in said custom house, and the port of Mobile has ever since been her home port.

The Code of Alabama declared as follows: .

“Section 3465. A lien is hereby created on all ships, steamboats and other water crafts, whether the same be registered, enrolled, licensed, or not, that may be built, repaired, fitted, furnished, supplied or victualed within this state, for work done or materials supplied by any person within this state, for or concerning the building, repairing, fitting, furnishing, supplying or victualing such ships, steamboats or other water crafts, and for the wages of the masters, laborers, stevedores and ship-keepers of such vessels, steamboats or other water crafts, in preference to other debts due and owing from the owners thereof, which said lien may be asserted in any court of competent jurisdiction.

“Section 3466. *Lien lost if action not brought in six months.*—b. The lien hereby created shall expire after the lapse of six months from and after the maturity of the claim

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or debt, unless within the said six months judicial proceedings shall have been commenced to assert such lien."

Under these provisions of the statute law, and after the registration of said mortgage, a large number of liens had been created for supplies, etc., furnished the Bradish Johnson in her home port of Mobile, and other ports of the state of Alabama.

The district court referred the claims of all the creditors of the boat to a commissioner to report a tableau of distribution.

The commissioner reported accordingly, and recommended the payment, *first*, of the costs of suit; *second*, of the maritime liens under the general admiralty law; *third*, liens under the state law, and these being sufficient to exhaust the proceeds of the steamer in the registry of the court, there was nothing left for distribution to the mortgagee. The report of the commissioner was confirmed by the decree of the district court.

From this decree Cavaroc appealed to this court.

Messrs. Alex. McKinstry, Thomas H. Herndon, John Little Smith, Peter Hamilton, T. A. Hamilton, Wm. Boyles and G. Y. Overall, appeared for the libelants.

Messrs. John T. Taylor and Thos. N. Macartney, for Cavaroc the mortgagee.

Woods, Circuit Judge. The appellant Cavaroc concedes that liens by the general maritime law, such as for seamen's wages, supplies furnished the steamer in a foreign port, take precedence of his mortgage, but he denies that the lien given by the law of Alabama to material men and others, for repairs and supplies in the home port of the steamer, is entitled to priority over the lien created by the registration of his mortgage under the act of congress.

This contention presents the main question brought up by the appeal.

Section 4192 of the Revised Statutes of the United States, which became a law July 19, 1850, declares that "no bill of sale, mortgage, hypothecation or conveyance of any vessel,

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or part of any vessel, of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance is recorded in the office of the collector of customs where such vessel is registered and enrolled. The lien by bottomry on any vessel, created during her voyage by a loan of money or materials necessary to repair, or enable her to prosecute her voyage, shall not lose its priority, or be in any way affected by the provisions of this section."

I think it clear that the effect of this section is, that where a bill of sale, mortgage, hypothecation or conveyance of a vessel is recorded in accordance with the terms of the law, it is valid, not only against the mortgagor, his heirs and assigns, and persons having actual notice thereof, but against other persons.

It is not contended by the appellant that a mortgage so recorded would prevail over strictly maritime liens, but it is claimed that its lien is better than any subsequent lien not recognized by the general maritime law.

In the case of *The Lottawanna*, 21 Wall., 558, it was held by the Supreme Court, that according to the maritime law, as accepted and received in this country, material men who furnish repairs and supplies to a vessel in her home port, do not acquire thereby any lien upon the vessel.

The question is, therefore, reduced to this, can the states, by the passage of laws giving a lien upon vessels for supplies furnished in the home port, override a lien created by a mortgage recorded according to the act of congress and declared to be valid against all liens except maritime liens?

No reason is perceived why supplies furnished in the home port of the vessel, where the mortgage is of record, should take precedence of the mortgage. The act of congress, in effect, gives validity to the lien of the mortgage, from the date of its record. No state law can postpone this lien in favor of one subsequently made.

It is insisted, however, that a contract for supplies to a vessel is a maritime contract, that the state law of Alabama

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has given a lien for such supplies, and that by an amendment to admiralty rule twelve, promulgated by the Supreme Court, on May 6, 1872 (13 Wall., 14), the material man is allowed to sue *in rem*, in the admiralty courts, to enforce such lien, and that, therefore, the lien takes precedence of the lien of a mortgage duly recorded before the debt for supplies was contracted. In other words, it is claimed that the twelfth rule, as it now stands, gives the same lien for supplies in the home port as that given by the general maritime law for supplies furnished in a foreign port.

In reply to this, it is sufficient to say that neither the Supreme Court of the United States, nor any other court, can, by rule, either create liens or postpone one lien to another. It may regulate the practice and method of procedure, but it cannot displace one lien in favor of another. So, by allowing material men, who have furnished supplies to a vessel in her home port, to proceed *in rem*, when the state law has given a lien, the court does not attempt to give the lien any precedence over prior liens, by mortgage or otherwise. In the case of the *Lottawanna*, *supra*, the court says (page 579): "As to the recent change in the admiralty rule (the 12th) referred to, it is sufficient to say that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any new liens which, of course, this court could not, in any event, do, since a lien is a right of property, and not a mere matter of procedure."

The priority of a lien is also a right of property, and the Supreme Court could not, by rule, any more interfere with the priority of liens than it could create liens.

So that the case stands just as it did before the amendment to the twelfth admiralty rule, and the question comes back, can a state, by its legislation, create a lien which shall have priority over one already existing by virtue of an act of congress?

The question carries with it its own answer: *White's*

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Bank v. Smith, 7 Wallace, 646; *Aldrich v. Aetna Company*, 8 Wall., 491.

In my judgment the lien of a mortgage, duly recorded, is superior to any subsequent lien for supplies in the home port, given by the legislation of a state.

This view has been held by Judge Drummond, in the *Grace Greenwood*, 2 Bissell, 131, and in the *Kate Hickman*, 6 Bissell, 367. See, also, *Scott's Case*, 1 Abbott's U. S. Reports, 336.

It has also heretofore been held by the circuit court for the district of Louisiana. See the case of *The John T. Moore*, *supra*, 61.

It follows, therefore, that the mortgagee is entitled to be paid out of the proceeds of the boat, next after the payment of the costs and general maritime liens, and before the liens created by the state law, for repairs and supplies in the home port.

A decree in accordance with these views has been handed to the clerk for entry upon the minutes of the court.

JUNE TERM, 1879.

JOHN SWAN v. JOHN S. WRIGHT'S EXECUTORS.

1. On the filing of a bill of review, the equity practice requires the complainant to give security or deposit a sum of money for satisfying the costs and the damages for delay, if the case is found against him.
2. But if such a bill is filed without security or deposit, and the defendant allows the case to proceed and costs to accumulate without objection, he cannot have the bill instantly dismissed on motion.
3. In such case the complainant will, on motion, be ordered to give the security or make the deposit within a day named, and, in default thereof, his bill will be dismissed.
4. To entitle a party to bring a bill of review, it is necessary that he should have obeyed and performed the decree.
5. When the complainant, in a bill of review, had leave of the court to

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- file his bill, and had performed all things required by the decree up to the time of filing his bill of review, but had failed to perform matters required by the decree to be performed after the date of filing the bill of review, he was ordered by the court, on motion of the defendant, to perform, by a certain day, those matters as to which he was in default, on penalty of having his bill of review dismissed.
6. It is no sufficient reply to a motion to dismiss a bill of review on the ground that the decree sought to be reversed has not been performed, to say that there is ample security for the performance of the decree. The defendant in the bill of review is entitled to the absolute performance of the decree.

IN EQUITY. Bill of review.

The Alabama & Chattanooga railroad company, by authority of a decree of this court, made on January 23, 1874, was, on December 4, 1876, by the masters appointed for that purpose, sold to John T. Wilder and D. C. McMillen, who, on March 30, 1877, transferred their bid and purchase to the complainant, John Swan, and on June 30, 1877, a decree of this court was made confirming said sale, and substituting the complainant as purchaser in the stead of said Wilder and McMillen.

The sale was made for the price of \$600,000, and the property was sold subject to the lien of certain receiver's certificates which had been issued by authority of the court, and the interest accrued and to accrue thereon, which was evidenced by coupons attached.

The receivers were authorized to issue twelve hundred certificates of \$1,000 each, due in ten years after date, with eight per cent interest, payable semi-annually. The certificates all bore date September 5, 1872, and are to fall due September 1, 1882. The executors of one John S. Wright claimed to be the *bona fide* owners and holders of one hundred and eleven of said receivers' certificates for one thousand dollars each, with a number of past due coupons, and upon a reference to Lyman Gibbons, Esq., master, he reported on April 7, 1877, that said one hundred and eleven certificates so held by the executors of said John S. Wright, with the interest coupons thereon, were just and valid claims in favor of said executors, and on June 14, 1877, said report was con-

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firmed by the court, and said certificates and coupons allowed in favor of said executors.

The decree of the court of June 19, 1877, confirming the sale of said railroad to Swan, after reciting the payment by him of the sum of \$80,000, part of his bid of \$600,000, ordered and directed him to pay \$30,000 of the residue within thirty days from the date of the decree of confirmation, \$190,000, with interest thereon, on or before the first day of the then next term of the court, to wit, the fourth Monday of December, 1877, and the residue of his bid, to wit, \$300,000, with interest, on or before the first Monday of June, 1878.

The payment of the \$30,000 installment was made according to the terms of the decree, but on December 17, 1877, on the application of Swan, the time for the payment of the installment of \$190,000 was extended from the first to the last day of the December term, 1877.

During said term, to wit, on January 19, 1878, an order was made by the court suspending all further payments of the unpaid purchase money of said railroad until the fourth Monday of June then next following.

By a subsequent order, dated June 20, 1878, the court extended the time for the payment of the residue of said bid of \$600,000 to July 11, and on that day said residue was paid into the registry of the court.

On February 13, 1878, Swan applied to this court for leave to file a bill of review to reverse and annul so much of the decree of June 14, 1877, as confirmed the report of the master establishing the said certificates and allowing them to the executors of John S. Wright.

The bill of review alleged that the complainant had, since said decree, discovered evidence which showed the invalidity of said certificates allowed to John S. Wright's executors, and it also charged, upon information and belief, that said executors fraudulently concealed and withheld said evidence from the master and the court, and thereby procured the decree of the court establishing said certificates.

The bill of review alleged that the complainant therein

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"had made no default, but had fully complied with the order and decrees of the court in respect to his said purchase, and that, by an existing order of the court, the payment of the said claim of said John S. Wright, as well as of other claims, was postponed to a future period, and remained so postponed."

The court granted leave to file said bill of review, and it was accordingly filed on February 13, 1878.

On June 3, 1878, the defendants to the bill of review filed their answer, in which the objection was taken to the bill that the complainant had not complied with the terms of the decree which he sought by his bill to review.

After the case was put at issue by replication, examiners were appointed by the court, and a large mass of testimony was taken.

Neither before nor since July 11, 1878, the date on which the last indulgence for paying the purchase money of the road expired, had any interest been paid upon the certificates held by the executors of Wright. When the bill of review was filed on February 13, 1878, nearly \$40,000 of interest was due on the certificates held by the defendants, and more than \$10,000 interest had since accrued, and no part of these sums had been paid.

The complainant had not given any security for the costs nor had he made any deposit of money to be applied to the costs, as required by the rules of the court.

On June 16, 1879, the defendants filed a motion to dismiss the bill on two grounds.

1. Because no security for costs had been given or deposit of money made, as required by the rules of the court; and

2. Because the complainant had not performed the decree of the court which his bill of review sought to reverse.

Messrs. Peter Hamilton, T. A. Hamilton, Moorfield Storey and E. L. Grandin, for the motion.

Messrs. S. F. Rice and David Clopton, contra.

Woods, Circuit Judge. This is the first time that the defendants have brought to the notice of the court the fact that no security for costs had been given by the complainant.

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The defendants have answered, the complainant has replied, and an immense mass of testimony has been taken at great cost and expense.

The English rule on this subject of security for the costs is without question substantially the rule by which this court is to be governed. The fifth of Lord Bacon's ordinances provided that no bill of review should be put in except the party that preferred it entered into recognizances, with sureties, for satisfying costs and damages for the delay, if it was found against him.

This provision being insufficient, by an order of March 12, 1700, it was ordered, for the future, that no bill of review should be allowed or admitted, except the party who preferred it first deposited the sum of £50 with the registrar of the court as a pledge to answer such costs and damages as the court should award to the adverse party, in case the court should think fit to dismiss the bill of review: 3 Daniels' Ch. Pr., 1730.

But conceding this to be the rule of this court, yet if a bill of review is filed without security or deposit of money, and the defendant allows costs to accumulate without objection, he cannot have the bill dismissed on that account. The conduct of defendant is a waiver of his right to have the bill dismissed. The most he can claim is that complainant shall be ordered to give security within a given day, and in default thereof that then his bill be dismissed: *Lavage v. Burke*, 50 Ala., 61.

The first ground of the motion to dismiss is, therefore, not well taken.

The second ground for the motion to dismiss is, that the complainants have not performed the decree.

To entitle a party to bring a bill of review, it is necessary that he should have obeyed and performed the decree, as if it be for land, that the possession be yielded, if it be for money, that the money be paid: 3 Daniels' Ch. Pr., 1730.

And by the third and fourth of Lord Bacon's ordinances, no bill of review shall be admitted, or any other new bill,

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to change matter decreed, except the decree be first obeyed and performed: Mitford's Eq. Pl., 6 Am. ed., 106, note.

And Lord Redesdale says: "It is a rule of the court that the bringing of a bill of review shall not prevent the execution of the decree impeached, and if money is directed to be paid before the bill of review is filed, it ought regularly to be paid before the bill of review is filed, though it afterwards be ordered to be refunded? Mitford's Eq. Pl., 6th Am. ed., 106. In *Wiser v. Blachly*, 2 Johns. Ch. R., 488, Chancellor Kent says: "The party asking for a bill of review must generally show that he has performed the decree, especially if it be a decree for the payment of money, and he must likewise pay the costs, and nothing will excuse the party from this duty but evidence of his inability to perform it. This appears to be a settled rule laid down in the ancient and modern books."

In *Partridge v. Osborne*, 5 Eng. Ch. Reports (5 Russell), 195, the lord chancellor said: "Whatever the party is bound to do whenever the bill of review is put on file, that he must do before the bill is filed. But as the permission to file a bill of review is always given upon the assumption and implied understanding and engagement that the original decree shall be performed, I am also of opinion that if, after the bill is filed, the period arrives when money ought to be paid, it is incumbent on the party to pay that money. Otherwise an application to dismiss the bill may be made on that ground, he having filed the bill upon an engagement and understanding which he has failed to comply with."

In the case of *Williams v. Mellish*, 1 Vernon, 117, a motion was made on behalf of the plaintiff, that proceedings might be stayed on a decree until the plaintiff was heard on a bill of review. But the lord keeper said: "In this case the decree shall be performed to a tittle before any bill of review be allowed, unless the plaintiff Williams will swear himself not able to perform the decree, and will surrender himself to the fleet, to lie in prison till the matter be determined on the bill of review."

See, also, on this subject, the following cases: *Anonymous*,

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12 Mod., 343; *Bishop of Durham v. Liddell*, 2 Bro. P. C., 63; *Wiser v. Blachly*, 2 John. Ch., 488; 2 Smith's Ch. Pr. (2d Am. ed.), 53.

These authorities apply not only to bills of review, strictly so-called, but to all bills in the nature of bills of review, which seek to disturb decrees of the court already rendered: Bacon's Ordinances, 3 and 4, *supra*.

Has the complainant in the bill of review performed the decree?

This question can only be answered by inquiring what the decree required him to do.

The property which the complainant purchased was sold to him for a fixed sum, and subject to the lien of such receiver's certificates as should be allowed by the court, and other claims superior to the first mortgage bonds. The fixed sum, namely, \$600,000, and the liens superior to the first mortgage bonds, including receiver's certificates, principal and interest, constituted the purchase money. The decree of the court contemplated the payment of the interest as it fell due on the receiver's certificates, as much as it did the payment of the bid of \$600,000.

If the purchaser was not bound to pay the interest on the receiver's certificates as it fell due, then the question occurs, when was he bound to pay the interest?

His obligation, under the decree of the court, was duly to pay his bid, \$600,000, in the installments fixed by the court, and to pay such interest coupons as were due and not extinguished by the \$600,000, and to pay the coupons not due as they fell due.

The complainant himself has put this construction upon the decrees of the court, and his obligations thereunder. In the fourteenth paragraph of his bill he states that he has made no default in complying with the order or decrees of the said circuit court, in respect to his said purchase, * * and that by an existing order of said court, made during the present term, * * * the payment of the said claims of John S. Wright, as well as of other claims, was postponed to a future period.

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The order referred to here was that made January 29, 1878, "that any and all payments of the unpaid purchase money arising out of said purchase of petitioner Swan, be and the same is hereby suspended and postponed until the fourth Monday of the next regular term of this court."

It is, therefore, evident that the complainant himself considered the certificates of Wright a part of the purchase price of the railroad, and that it was his duty, under the decrees of the court, to pay the interest thereon as it accrued, for he claimed that the order of the court just quoted was effectual to prolong the time for the payment of the claim of Wright.

When, therefore, Swan applied to the court, on January 22, 1878, that all further payment of the unpaid part of the purchase money, under said purchase of said Swan, might be stayed and postponed till the further order of the court, he asked to have the payment of the past due coupons on Wright's certificates postponed. If the claim of Wright was not then payable by the terms of the decree of the court, there was no propriety in asking the court to postpone its payment.

The undoubted purpose of the order of January 29, 1878, was to postpone the payment of all sums which, by the decree of the court, were then due from Swan on his purchase. His petition for postponement represented that, by a bill filed in the U. S. circuit court for the northern district of Alabama, a mortgage lien superior to the mortgage lien by virtue of which the sale had been made, was set up against said railroad which he had purchased. The purpose of the postponement of payments prayed for in his petition was, that he might ultimately be relieved from his purchase, in case the prior lien set up in said bill should prevail.

It was, therefore, just as important that he should be relieved from the present payment of past due coupons on the receiver's certificates, which at that time amounted to about \$400,000, as from the unpaid balance of his bid, which was only \$300,000.

It may, therefore, be assumed that the order of January 29, 1878, and the subsequent orders on the same subject, heretofore mentioned, postponed until July 11, 1878, the

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payment of all sums due and payable by Swan on his purchase, whether due on his bid or due on coupons attached to the receiver's certificates. That was what Swan asked for, and that was what the court granted him.

When, therefore, on February 13, 1878, in his petition for leave to file his bill of review, he stated that he had performed up to that time all things required of him by the orders and decrees of the court, he stated, so far as appears, what was the truth, and upon that statement the court allowed the bill of review to be filed.

Therefore, when the defendants, in their answer filed June 3, 1878, set up, as a defense to the bill of review, that the complainant therein had not obeyed and performed the decree of the court, their allegation was not sustained by the facts of the case.

But on July 11, 1878, the indulgence granted by the court to Swan expired. The entire residue of his bid was then due and he paid it. But it was just as incumbent on Swan to pay on that day the past due interest on the receiver's certificates, as the residue of his bid. The orders and decrees of the court required it. The grace which he had asked from the court for the payment of this interest, including the coupons belonging to Wright's certificates, had expired. He had no warrant for another day's delay. Yet, up to this time, although there is \$50,000 of interest due on the certificates held by the defendants, it is not pretended that he has paid them one cent. His failure to pay is a contemptuous disregard of the orders and decrees of this court. In the mean time, the bill setting up a prior lien on the railroad property has been dismissed; he is in the undisturbed possession and enjoyment of the railroad, and he still prosecutes his bill of review, without any pretense of compliance with the decree of the court which he seeks to review.

It is no excuse that the railroad property on which his certificates are a lien is ample security for the performance of the decree. These defendants are entitled to something more than security. They are entitled to the absolute and unconditional performance of the decree. After, as in this

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case, the court has deliberately settled the rights of the parties by its decree, the operation of the decree cannot be suspended by the filing of a bill of review, either with or without leave.

The complainant was allowed to file his bill of review on the assumption that he would perform the decree, unless relieved from performance by the orders of the court.

If, after the bill of review is filed, the period arrives when money ought to be paid, it is incumbent on the party to pay that money, otherwise an application to dismiss the bill may be made, he having filed the bill upon an engagement and understanding which he has failed to comply with: *Partridge v. Usborne, supra*.

This is the first time since the complainant has been in default that the fact has been brought to the attention of the court.

The defendants are now entitled to require the complainant to give security for costs, and to perform so much of the decree as it was his duty to perform up to this time. But he is not, under the circumstances, entitled to a peremptory order of dismissal. The complainant should be allowed a reasonable time to discharge the duty required of him.

The final hearing of this case having been heretofore fixed for October next, the order of the court will be that, unless by that time the complainant gives security for the costs, and pays to the defendants all coupons which at that date shall be past due on the certificates held by them, his bill of review shall be dismissed out of this court.

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DUNCAN & ELLIOT, TRUSTEES, v. THE MOBILE & OHIO
RAILROAD COMPANY ET AL.

(Before BRADLEY and WOODS, JJ.)

1. If bondholders secured by a mortgage on a railroad, purchase the entire property at a foreclosure sale, they have an equitable right, after satisfying the costs and charges of the litigation and trust, to pay the residue of their bid in bonds, so far as to cover their own proportion of such residue.
2. The disposal, by decree of court, of railroad property mortgaged to secure many bondholders, so as to protect the interests of all, is beset with difficulties. In this case, where a large proportion of the bondholders had combined to purchase the railroad, or to reorganize the company without a sale, the court allowed the non-subscribing bondholders to participate in the purchase or reorganization on an equal footing with the others, provided they came in by a day named.
3. Penalty of appeal bond in this case fixed at \$100,000, and reasons given therefor.

IN EQUITY.

In this case, which was a bill to foreclose the first mortgage executed by the Mobile & Ohio railroad company on its railroad and other property, it appeared that a large majority, both in number and amount, of the bondholders secured by said mortgage, had entered into an arrangement with each other for the purchase of the mortgaged property for their common benefit, or for the re-organization of the railroad company without a sale.

After some discussion as to what form the decree should take, so as to protect the rights of the bondholders who had not come into the arrangement, Mr. Circuit Justice Bradley expressed the following views:

Messrs. John A. Campbell, Peter Hamilton, T. A. Hamilton, F. N. Bangs, J. A. Garfield, George N. Stewart, W. G. Jones, George Hoadly, E. H. Grandin and E. L. Andrews, representing the various parties in interest.

BRADLEY, Circuit Justice. Bondholders secured by a common mortgage have equal rights in the common security,

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proportional to the amount held by each. If the mortgaged property be sold to a stranger, the proceeds are equally distributed and perfect justice is done to all. If bondholders purchase the entire property, they have an equitable right, after satisfying the costs and charges of the litigation and trust, to pay the balance in bonds, so far as their own proportion of such balance extends, for it is to come to them. But it is evident that those who singly, or in combination, hold a large portion of the bonds, have a great advantage over the minority; for they can pay their own proportion of the purchase money, which is much the largest, in bonds, and have only a small amount of cash to pay, whilst the minority can only pay a small proportion in bonds, and have a large amount to pay in cash, which, as a generality, they are totally unable to pay. This practically puts it in the power of the majority to get the property at a large sacrifice, and turn the minority off with a mere pittance. This is inequitable, and to be avoided if possible. Perhaps the most equitable mode of disposing of the property (when practicable), when it cannot be sold for cash to an amount sufficient to pay the bondholders, is to decree a strict foreclosure, in which all will participate alike, or to make a sale for the equal benefit of all the bondholders who choose to come in and participate. A strict foreclosure may be attended with difficulties in those states where a mortgage is a mere security, and does not give a legal title, besides which, it places the property in the hands of a vast number of beneficiaries whose consent may be very difficult to obtain in perfecting a new organization for conducting the business. A sale for the benefit of all is attended with the difficulty of determining who shall make the bid. The court has sometimes authorized the trustees of the mortgage to bid for the bondholders. In this case, it is obvious that one class or the other of the bondholders would be dissatisfied with any selection of trustees which the court might make.

To decree that all the bondholders shall be allowed to participate in any sale that may be made, would practically nullify an auction sale. Who would bid on such terms?

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In this case, it has been brought to our notice that a scheme for reorganizing the company, or the interests represented in its property, has been agreed to and subscribed by about seventy-eight per cent (in interest) of the first mortgage bondholders. We have examined this scheme, and if not perfectly equitable, we are unable to point out any want of fairness in it. It would give to those who have not joined in it, should they do so, about twenty and one-half per cent interest in the entire purchase; whilst if all first mortgage bondholders (including the Tennessee bonds in the number) were placed on an exact proportionate division, the non-subscribing interest in the purchase would amount to about twenty-one and five-eighths per cent. But they run the risk of the Tennessee bonds being placed ahead of the others. If the latter were given the preference, then, subject to that incumbrance, the non-subscribing interests would, by an equal division with the others, take about twenty-four eight-tenths per cent of the purchase, which is probably less advantageous to them than the proposed plan of reorganization would be.

Looking at the difficulties which beset the subject on every side, we think that if we allow the non-subscribing bondholders to participate in the purchase of the property, should it be made in behalf of the reorganizing combination, on an equal footing with those who have joined it, that we shall have done all that we can do under the circumstances to protect their interests. The parties representing the reconstruction scheme, through their counsel, have offered to allow them to come in, and to extend the time for doing so until the first of August. We suggest that this time should be extended to the day of sale of the property. We perceive that the trustees have the power to do this—and keep the agreement on foot by extending the time sixty days at a time. We have, therefore, proposed an additional proviso to the decree to carry out this view. We hope that it will be acceded to by the counsel for the complainants and those representing the reconstruction scheme. We do not wish to dictate these terms to the parties who propose to purchase, but suggest that, in our judgment, the interest of all parties

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would be subserved by an arrangement of this sort. (The counsel for the complainants here suggested that it was very desirable, if the plan of reconstruction should be generally adopted, to avoid any sale at all, and proposing to extend the time for other bondholders to come to an arrangement, to the 1st of September, the court adopted that modification, and announced that the decree would be made accordingly, unless very forcible objections to it should be presented at to-morrow's session of the court.)

WOODS, Circuit Judge, concurred.

Counsel for Ketchum & Moran having applied for a rehearing, the court denied the application.

Counsel for Ketchum & Moran then applied for the allowance of an appeal, and also to fix the amount of the appeal bond at \$10,000. On this application the court, after consideration, delivered the following opinion, fixing the bond at \$100,000.

BRADLEY, Circuit Justice. An appeal being granted and allowed in these cases from the decree rendered therein on the 15th day of June, 1877, the question is raised as to the amount of the appeal bond to be given by the appellants, they being the plaintiffs in the second and third suits, and defendants in the first.

The decree appealed from sustained the claim of Alexander Duncan, as holder of certain first mortgage coupons to the amount of over \$500,000 to come in *pari passu* with the first mortgage bondholders, and directs a foreclosure of the first mortgage and a sale of the mortgaged property to pay the bonds secured thereby, and also certain other bonds given for interest, amounting in the aggregate to about ten millions of dollars. Purchasers are, by the decree, allowed to pay the purchase money in bonds and coupons to the extent of their proportionate interest as bondholders in the whole amount of first mortgage bonds. About four-fifths of the bondholders have agreed to and subscribed a scheme for reorganizing the company and purchasing the road.

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The court has allowed the remaining bondholders until the 1st of September to join in said scheme.

A portion of the bondholders, holding less than one-tenth of the entire mortgage interest, are dissatisfied with the decree, and promote the appeal.

The property being in the hands of a receiver, and not producing much, if any, more than the expenses and necessary repairs of the road, the bondholders to whom the property or its proceeds really belongs, will be kept out of possession for two or three years by the intervention of the appeal.

This delay in obtaining possession of the property or its proceeds we regard as calculated greatly to injure them.

By having immediate possession they could make the necessary improvements and connections required for making the property much more remunerative, and could manage it much more to their advantage generally than a receiver can do.

Or, if the property were immediately sold, they would be in possession of the interest of the purchase money, of which they will now be deprived for two or three years by the appeal.

In our judgment, therefore, an appeal bond for one hundred thousand dollars is very moderate in amount.

The appellants contend that on the principles of the decision of the Supreme Court in the case of *Jerome v. McCarter*, 21 Wall., 17, a bond for one hundred thousand dollars is greatly in excess of what should be required.

They insist that, in contemplation of law, possession by a receiver is equally beneficial to those who are interested in the property, as possession by the parties themselves.

Whilst this may be the case with regard to dead property, or even real estate generally, we think it is not so where the property, like a railroad, is perishable in its character, and has to be managed, worked, repaired and taken care of, in order to preserve it.

We think that the owner is a better manager than a trustee or receiver, who is hampered and restrained in his manage-

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ment, and cannot take advantage of all those means and opportunities which the owner could do for rendering the property most profitable and productive.

On these grounds, we think that the damage sustained by the delay will be much more than the mere costs and expenses of the suit, and that the actual loss and injury to the owner, or in this case, the bondholders, may be taken into consideration by the court in fixing the amount of the bond, and that loss and damage, we think, will not be less than the amount we have required.

The most forcible difficulty which presents itself to our minds is the measure of damages which would be applicable in a suit on the bond.

Would it be admissible for the plaintiffs to show a loss to the bondholders by reason of advantages lost for the cause above referred to? Of this there may be a question. But our opinion is, on the whole, that such a damage would be the subject of a recovery.

If damages are really sustained, there seems no good reason why they should not be recovered.

Woods, Circuit Judge, concurred.

MIDDLE DISTRICT OF ALABAMA.

AT CHAMBERS, FEBRUARY, 1879.

**EX PARTE GEORGE TURNER, UNITED STATES MARSHAL, EX
PARTE CHARLES E. MAYER, UNITED STATES ATTORNEY.
HABEAS CORPUS.**

1. When a person is in custody for an act done or omitted, in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof, he is entitled to be discharged on *habeas corpus*, no matter by what authority he is restrained of his liberty, nor how regular and formal the proceedings against him may be.
2. The fact that he is in custody, by virtue of the judgment of a state court, for contempt, forms no exception to this rule.
3. When poll-books, ballots and other papers relating to an election have, by virtue of the process of a court of the United States, come into its possession, where they are retained to be used as evidence in prosecutions pending in that court, they cannot be taken from its custody by the order of a state court, on the ground that the law of the state places them in the keeping of the inspector of elections.
4. Both the state and federal courts have the power to require the production of ballots, poll-books and other papers relating to an election, when they are necessary and proper evidence in prosecutions for offenses of which those courts respectively have jurisdiction, notwithstanding the fact that the state law places their custody with the election inspector.
5. The court which first obtains, by its process, possession of papers and documents which are proper evidence in a prosecution pending in such court, has the right to retain them until they have been used in evidence, and no other court of concurrent jurisdiction can, without its leave, take them from its custody, or require its officers to produce them before its grand jury.
6. Officers of a court of the United States, who are arrested by a state court for contempt, in refusing to obey such a requirement, are entitled to be discharged on *habeas corpus*.

Heard at Chambers, January 28, 1879.

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Messrs. L. W. Day, Assistant United States Attorney, and Robert McFarland, for petitioners.

Messrs. John D. Brandon and Paul L. Jones, contra.

BRUCE, District Judge. These cases are, by agreement, heard together. The same legal principles apply and control in each. The facts of the cases will appear in the opinion.

The petitioner, George Turner, who, it appears from the evidence, was at and before the time of his arrest and imprisonment, and still is, marshal of the United States for the southern and middle districts of Alabama, and Charles E. Mayer, who was at and before the time of his arrest, and still is, district attorney of the United States for the northern and middle districts of Alabama, applied each for the writ of *habeas corpus*, under section No. 753 of the Revised Statutes of the United States.

They both allege, in their applications for the writ, that they were illegally restrained of their liberty by one George Mason, sheriff of Dallas county, Alabama, under an order and judgment of the city court of Selma, adjudging them to be in contempt of that court, for an act done or omitted under a law of the United States, and an order, process and decree of a court thereof.

The sheriff of Dallas county, Alabama, brought the bodies of George Turner and Charles E. Mayer before me, at Huntsville, Ala., in obedience to the writ, and stated, as his return thereto, as follows:

“I am the sheriff of the said county, and, as such, the keeper of said jail therein, and, as such sheriff, the said George Turner is detained by me, and that the cause of his detainure is as follows, to wit: The city court of Selma, held in and for said county and state, then being in session, adjudged the said George Turner to be guilty of contempt of said court, and, for such contempt, ordered him to be imprisoned in the jail of said county for five days, and to pay a fine of fifty dollars and the costs, and to remain in jail until the said fine and costs be paid, and until certain papers thereon were produced before said court, and further ordered

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me, at the expiration of five days, to bring said George Turner before said court, on the 22d instant, for further orders in that behalf, and, under the orders of said court, the said George Turner was committed to the jail of said county, and, therefore, to my custody as such sheriff, all which will more fully appear by a transcript of the record and proceedings of said city court of Selma, hereto annexed, and marked 'Exhibit A,' and made a part of this return."

The return of the sheriff, in the case of Charles E. Mayer, is similar to that in the case of Turner, except that there was no judgment of commitment as to time.

The question is, do these cases, as made by the evidence on this hearing, fall within section 753 of the Revised Statutes of the United States?

The words of the section are:

"The writ of *habeas corpus* shall in no matter extend to a prisoner in jail, unless when he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or if in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof."

The question is not by what authority these petitioners are restrained of their liberty and detained in custody, but whether were they restrained of their liberty by any authority whatever, for an act done or omitted in pursuance of a law of the United States, or by an order, process or decree of a court or judge thereof. Nor is the question which I am to consider on this hearing, whether the proceedings in the city court of Selma against the petitioners, for an alleged contempt of the order and process of the court, were regular or irregular, or whether they were free from error, but the question is: Are these petitioners restrained of their liberty and detained in custody for an act done or omitted in pursuance of a law of the United States, or an order, process or decree of a court or judge thereof. If it be true that they are so restrained, no matter by what authority, or by what formality or solemnity of judgment, they must be discharged.

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It is clear that this section 753 of the Revised Statutes of the United States, was designed for the protection of officers of the United States, for acts done by them or omitted in the execution of the laws of the United States, and in obedience to the orders and decrees of the courts thereof.

The congress which enacted this law, which was approved March 2, 1833, recognized it as at least possible that officers of the United States, for acts done or omitted in the execution of the laws of the United States, and for acts done or omitted in obedience to the orders and decrees of its courts, might be arrested and deprived of their liberty by state authority, and this statute provides a remedy for such a state of things.

What, then, were the acts done, or omitted to be done, by these officers, which resulted in their arrest and detention by the order of the city court of Selma? That will best appear by a reference to the order made by the city court of Selma, dated August 9, 1879, which seems to be the initiatory step to the proceedings which were subsequently taken, and which resulted, as the record shows, in a judgment of contempt and the arrest of these officers. The order is in these words :

“On application of the grand jury, it is ordered by the court, that the subpoenas *duces tecum* be forthwith issued by the clerk and register of this court, to Charles E. Mayer, George Turner, J. W. Dimmick and W. J. Bibb, to be and appear before the grand jury of this court, *instantly*, and that they bring with them all ballot-boxes, poll-lists, ballots, inspectors' certificates, inspectors' returns, tally-sheets, statements, and all other papers and things pertaining or relating to the election held in the county of Dallas, in the state of Alabama, on the 5th day of November, A. D. 1878, for representatives in congress for the fourth congressional district of Alabama.

“ [Signed] JNO. HARALSON, *Judge, etc.*
“ January 9, 1879.”

The county of Dallas is within the middle district of Alabama, and, therefore, within the territorial jurisdiction of the circuit court of the United States for that district.

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It appears from the record that certain ballot-boxes, ballots, poll-lists and inspectors' returns and other papers pertaining to the election held in Dallas county, Alabama, on the 5th day of November, 1878, were produced before the grand jury of the circuit court of the United States for the middle district of Alabama, by the ordinary process of that court at the November term, 1878, of said court held at Montgomery.

It is said that the custodians of these boxes, ballots, poll-lists, inspectors' returns and other papers, under the law of Alabama, had no right to give them up to the custody of the circuit court of the United States, and that the custody of that court is illegal and wrongful. If it be correct to say that no authority was competent to take the boxes and papers from the custody provided by the law of Alabama, and if that be the true construction of section 288 of the code of Alabama, then by what right does the city court of Selma require the production of these papers by its process of subpoena *duces tecum*? But it is not important on this hearing to inquire how the ballot-boxes, ballots and papers came into the custody and control of the circuit court of the United States. The fact is they did come into such control, and that by the ordinary process of the court, and being there by means of such process, they cannot be wrested from it in the manner attempted. But it cannot be maintained that the custody of the ballots, poll-lists and papers which, by direction of the state law, is given to one of the inspectors who acted as such at the poll of election, places these papers beyond the reach and process of courts of justice, state or national, which are clothed with power and jurisdiction to indict and try offenders against suffrage and the elective franchise. There are a number of penal provisions in the code of Alabama for the protection of suffrage; they are found in chapter 8, sections 4279 and 4994 inclusive, and it will not be maintained that the courts of Alabama have not power to require the production of these ballots and papers when they are necessary and proper evidence in prosecutions under the law of which the courts of the state have jurisdiction. The election in question was for a representative in

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congress, and article 1, section 4 of the constitution of the United States provides, that "times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may, at any time by law, make or alter such regulations, except as to the places of choosing senators." The congress of the United States has provided a body of penal laws for the punishment of persons who may be convicted of crimes against the elective franchise and civil rights of citizens; they are found in sections 5506 and 5532 inclusive, of the Revised Statutes of the United States, and the circuit courts of the United States are invested with original jurisdiction to try offenders against these laws. We, then, see that the circuit court of the United States for the middle district of Alabama has power and jurisdiction to try persons charged with crimes against suffrage at the election held for member of congress on the 5th day of November, 1878, in the county of Dallas, state of Alabama. If it has such power and jurisdiction under the law, then it has the right and power to use its process to obtain the evidence, if it can be obtained, by which its jurisdiction can be made effective. If by means of its process it obtains documents and papers which are proper matters of evidence in any suit then pending, its jurisdiction attaches at once to such documents and papers, and no court of concurrent jurisdiction can by its process reach them. If it is otherwise, then one court could destroy the jurisdiction of another court of concurrent jurisdiction, by wresting from it the means by which that jurisdiction could be made effective. This is a case when the state courts and the federal courts have concurrent jurisdiction over the same subject, and it is a principle of law well settled that when the jurisdiction of a court, and the right of a plaintiff to prosecute his suit therein, have once attached, that right cannot be arrested or taken away by proceedings in another court, unless it be some court which may have a direct supremacy or control over the court where process has first taken possession, or some superior jurisdiction in the premises: *Freeman v. Howe*, 24 Howard, 450; *Buck v.*

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Colbath, 3 Wall., 334; *Peck v. Jenness*, 7 Howard, 612; *New Orleans v. Steamship Co.*, 20 Wall., 387.

In the last case cited, the Supreme Court of the United States uses this language: "The circuit court, having first acquired possession of the original case, was entitled to hold it exclusively until the same was finally disposed of. It was unwarranted in law, and grossly disrespectful to the circuit court, to invoke the interposition of the state court, as to anything within the scope of the litigation already pending in the federal court."

The circuit court of the United States acquired jurisdiction of the subject matter at the November term, 1878, of said court. The papers, matters and things in question here were used in evidence before the grand jury at that term of the court. True bills were found by the grand jury, at that term, against various parties, for offenses alleged to have been committed in the county of Dallas, state of Alabama, by means of fraudulent returns touching the election held in said county on the 5th day of November, 1878, and these cases are still pending and undetermined in said court.

It results from this, all of which is shown by the record and evidence upon this hearing, that the papers, matters and things in question came into the custody, control and jurisdiction of the circuit court of the United States for the middle district of Alabama, at the November term, 1878, of said court; that they are still in such jurisdiction, to be used in evidence in causes still pending in said court. And such being the fact, they are subject to the control and jurisdiction of no other court which has only concurrent jurisdiction of the same subject matter. The jurisdiction, then, of the circuit court of the United States over the subject matter was prior in point of time, and it was neither illegal nor unlawful, but such as is authorized by the laws of congress.

If this position be correct, then it was the duty of that court to defend its jurisdiction and protect it from invasion.

The order of the circuit court of the United States, made on the 13th day of January, 1879, at an adjourned term of said court, as the evidence shows, has been referred to as the

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source of the jurisdiction of the court over the papers in question. But that order did not, and could not, create jurisdiction, and was only directory to the officer, that the jurisdiction already acquired might be made more secure and inviolate against invasion.

Will it be seriously argued that the United States marshal, at the command and order of a court of another and different jurisdiction, should despoil and destroy the jurisdiction of the court of which he is a sworn officer? Had he obeyed the order of the city court of Selma, and removed the papers, matters and things beyond and out of the jurisdiction of the circuit court of the United States for the middle district of Alabama, without the order and authority of that court, he would have made himself justly liable to proceedings for contempt of the court, the jurisdiction of which was thus violated.

The cases at bar are, to my mind, clearly within the letter and spirit of section 753 of the Revised Statutes, cited above. The authorities cited in argument are in exposition of this statute, and sustain this view of the subject: *Ex parte Jenkins*, 2 Wallace, jr., 521; *Ex parte Robinson*, U. S. Marshal, 6 McLean, 355.

The conclusion is, that these officers were restrained of their liberty for an act omitted to be done in pursuance of a law of the United States, and an order, process and decree thereof.

It is unnecessary to go further, but I will notice one or two points made by the counsel for the state, in opposition to the discharge of the petitioners. It is insisted, and much authority is read to show, that the right of punishing for contempts, by summary conviction, is inherent in all courts of justice, and that every court is the judge whether a contempt has been committed against it. That proposition is not controverted, but it is equally well settled, that if a court, assuming to pronounce a judgment of contempt, or any other judgment, has no jurisdiction, the judgment is *coram non judice* and void. The question here is, did the city court of Selma have jurisdiction over the subject matter and over the

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parties, at the time it assumed to pronounce the judgment? If it had no jurisdiction of the subject matter, to wit, the papers, matters and things described in the subpoena, it could not require their production at the hands of any one. It does not clearly appear, from the record, whether this judgment of contempt was based solely upon the failure of the petitioners to produce the papers, matters and things in question, though the affidavit of Turner, to the effect that he was not required to go before the grand jury, and no questions were asked him touching any violation of law, in his knowledge, within the jurisdiction of the city court of Selma, indicates that the judgment of contempt was based solely upon the failure to produce the papers, matters and things in question, and not upon the failure to appear *instanter* in person, in response to the subpoena. The subpoenas are for George Turner and Charles E. Mayer, and these gentlemen, like other citizens of the state of Alabama, owe duties of obedience to her laws, and the process of her courts, and the fact that they are officers of the United States will not, and does not, absolve them from the duties which they owe as citizens of the state of Alabama.

It cannot be maintained, however, that the duties which they owe, of obedience to the process of the state courts, overbears and overrides their duties as officers of the United States, required, as they are by law, to attend upon the sessions of the courts of the United States, held in the district of their appointments.

It appears, from the record of the proceedings of the city court of Selma, that these officers made answer in writing, under oath, to the subpoena served upon them, and informed the court of the official positions which they respectively held, and stated the facts which prevented their attendance in person and *instanter* upon the city court of Selma, and it appears, from the record, that these returns were before the court when judgment of contempt was pronounced against them. The facts stated by them in their respective answers are not traversed, and it will hardly be contended that the duty of these officers to attend *instanter* and in person upon

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the session of the city court of Selma is of higher obligation than their duty, under the laws of the United States, to attend upon the sessions of the courts of the United States, of which they are officers. This is a question of vital importance; it touches the very foundation of the powers and jurisdiction of the federal courts.

Courts cannot exist without officers to conduct their business, serve their process and execute their mandates.

If officers of the courts of the United States can be arrested and imprisoned by process from state courts, for alleged violation of state law and authority, for acts done or omitted by them in the execution of the laws of the United States and the orders of her courts, and there is no remedy, then the courts of the United States are liable to constant obstruction in the exercise of their jurisdiction and powers, and their usefulness and efficiency, if not their very existence, is imperiled. It is true that the jurisdiction of the United States is limited and statutory, but it is also true, that wherever their jurisdiction attaches it is within the scope of that jurisdiction supreme and paramount. If that jurisdiction is invaded, or if the officers of the courts are interfered with in the discharge of their duties, the means are not wanting, nor their potentiality doubtful, to vindicate the just authority of the court in the administration of the laws of the United States.

The result of these views is, that the petitioners, George Turner and Charles E. Mayer, must be discharged from custody, and it is so ordered.

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MAY TERM, 1879.

SAMUEL A. STRANG v. THE MONTGOMERY & EUFAULA RAILROAD COMPANY.

1. The railroad, and other property of a railroad company, which had for several years been in the hands of a receiver, was sold by a decree of the court, which directed a sale of the road, the franchises of the company, right of way, depots, rolling stock, tools and all other property of the company, real, personal and mixed.

Held (1), That the purchaser was not entitled to the money, the surplus earnings of the railroad, in the hands of the receiver; and,

(2), That the purchaser was entitled to all cars, engines and other property placed on the railroad by the receiver, in the discharge of his duty, to carry on the business of the railroad and keep it in repair

This cause was heard upon a petition filed therein by the Louisville & Nashville railroad company.

The petition made the following averments:

The Louisville & Nashville railroad company had purchased, since July 3, 1877, and was the owner of 965 first mortgage bonds of the Montgomery & Eufaula railroad company, and also 1,307 coupons for forty dollars each, and that said first-named railroad company was the legal and equitable owner of said bonds and coupons, and they had been allowed by the master. While the Montgomery & Eufaula railroad company was in the process of construction, it issued its bonds for \$1,280,000, with interest coupons at eight per cent. and, under various statutes of the state of Alabama, procured the indorsement of the governor of the state upon said bonds, which indorsement had the effect to give the state a statutory lien on the railroad and other property of the railroad company, to secure the payment of the principal and interest of said bonds.

Afterwards, in June, 1870, the said Montgomery & Eufaula railroad company executed a mortgage on its railroad and

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other property to secure an issue of bonds to the amount of \$500,000.

This mortgage expressly recognized the priority of the lien of the bonds for \$1,250,000, indorsed by the state, on the property covered thereby.

On May 10, 1870, Samuel A. Strang, trustee of said mortgage, filed his bill in this court for the foreclosure of the same, whereupon A. J. Lane was appointed receiver of the road and property of the defendant company, and at once took possession and control of said property, and possessed, used and employed said property, and conducted the business of said railroad, until May 12, 1879.

On May 1, 1875, Mason Young, on behalf of himself and other first mortgage bondholders, filed his bill in this court to foreclose the statutory lien on said railroad, by which the first mortgage bonds were secured. These two suits were consolidated, and a final decree made by this court, adjusting the claims of the parties and establishing their rights, and ordering a sale of the property of the defendant company, to pay this said first mortgage, and for that purpose directed the sale of "all the railroad of the Montgomery & Eufaula railroad company; and all the franchises, rights, privileges and immunities of said company, and all the property of said company, including road-bed, right of way, depots, workshops, tools and implements, warehouses and real estate of every description, together with all appurtenances thereunto belonging, its rolling stock, locomotives, cars, and all other property, real, personal and mixed, of any kind or description whatever."

The original decree of sale was rendered July 3, 1877. Said decree was superseded by an appeal therefrom to the Supreme Court of the United States, which was dismissed about February 1, 1879, when application was made to this court for a supplemental decree, on February 22, 1879, to carry said original into execution, and said supplemental decree was then made by the court.

In pursuance of said decree, all the property and franchises of said railroad company, as described in the decree of July

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3, 1877, were advertised for sale, and sold at public sale, on May 1, 1879, to William M. Wadley of Georgia, for the sum of \$2,120,000 cash, which has been paid.

On May 6, 1879, the sale was confirmed, and the receiver was ordered by this court to deliver to the purchaser the property bought by him.

Included in the property in the custody of the receiver, at the time of the sale, were certain engines and cars and personal property, to be used in carrying on the business of the road, which were purchased by the receiver with the income and earnings of the road, earned while he carried on the same under the orders of the court, and before the day of sale, and a portion of said property was purchased by him after the decree of July 3, 1877, and with income and profits earned after that date.

All the cars and rolling stock appertaining to said railroad, as well that purchased by the receiver as aforesaid as that turned over to him when he first took possession of the railroad, were by him delivered to William M. Wadley, the purchaser at said sale.

On May 1, 1879, the day of sale, there was in the hands of the receiver the sum of \$22,185.92, income and profits of said railroad, earned and collected between July 3, 1877, the date of the original decree of sale, and May 1, 1879, the day of sale.

The amount bid at the sale of said railroad was insufficient to pay the first mortgage bonds and interest, and the amount still due thereon largely exceeded the value of said cars and other property purchased by the receiver, and the said sum of money in his hands.

The petition was filed by the Louisville & Nashville railroad company, in its own behalf, and for the benefit of all other holders of first mortgage bonds.

It claimed that the cars and other rolling stock, purchased by the receiver with the income and profits of the road, and by him placed upon and used in carrying on the business of the road, did not pass, by the sale of May 1, 1879, to Wadley, the purchaser, and that this property should be sold by

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order of the court, for the benefit of creditors of the road, according to their respective priorities, and that the purchaser, Wadley, should be required to deliver back said property when required, and that the said money in the hands of the receiver should be paid into the registry of the court, to be distributed among the creditors of the railroad company, according to their equities.

Wadley, the purchaser, answered the petition, admitting substantially the facts set out in the petition, but claiming that not only did the cars and rolling stock, mentioned in the petition, pass to him by the sale, but also the money in the hands of the receiver at the date of the sale, and that his possession of the cars and rolling stock should not be disturbed, and that the court ought to order the said money in the receiver's hands to be turned over to him.

Upon the issue of law, presented by these facts, the cause was submitted to the court.

Messrs. Thomas G. Jones and D. S. Troy, for petitioners.
Mr. Henry C. Semple, for the purchaser.

Woods, Circuit Judge. The claim of the purchaser, that the money in the hands of the receiver passed to him by the sale of the railroad and other property of the Montgomery & Eufaula railroad company, has no ground to stand on. One of the main purposes in the appointment of a receiver is, that the income of the railroad, so far as not used in the preservation of the property and conducting the business, may be applied to the payment of its mortgage creditors. If surplus earnings come into the hands of the receiver, they ought to be distributed to the creditors of the railroad company, in the order of their priorities. Such is the constant practice of courts of equity. The surplus earnings of a railroad, in the hands of a receiver, are not the property of the railroad company, and are not included in a general description of its property. The possession of the money is in the court, and the equitable title to it is in the creditors of the railroad company. Thus, in the *American Bridge Co. v. Heidelberg*, 94 U. S., 801, the Supreme Court says: "In this

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case, upon the default which occurred, the mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a receiver appointed and possession delivered to him. In either case, the income would thereafter have been theirs." This surplus in the hands of the receiver could not, therefore, be properly described as the property of the railroad company, because it was not its property.

A court should not be presumed to order so futile a thing as the selling of money, unless its decree to that effect is clear and specific.

The decree of sale in this case specifies as the property to be sold, the railroad and franchises and immunities of the company, and all its property, including road-bed, right of way, depots, shops, tools, rolling stock, real estate and all other property, real, personal and mixed.

Such a description of property does not apply to money. Under the celebrated rule, "that when particular words are followed by general ones, as if, after an enumeration of second classes of persons and things, there is added 'and all others,' the general words are restricted in meaning to objects of the like kind with those specified," it is clear that money is not included in the property ordered by the court to be sold.

The title to the money did not pass to the purchaser of the railroad, because the money was not the property of the railroad company, and because, even if it had been, it is not fairly included in the description of the property ordered to be sold. So much of the prayer of the petition as asks that this surplus fund be paid into the registry of the court for distribution among the creditors of the railroad company, must be granted.

The next question to be settled is, did the cars and other rolling stock purchased by the receiver from the income of the road, pass, by the sale, to the purchaser.

The mortgage which was foreclosed in this case covered not only the railroad and other real property, but also the cars, engines and other rolling stock, and all descriptions of

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personal property owned by the railroad company, or to be thereafter acquired. The road and its equipments constituted the complete and entire thing which was covered by the mortgage. The road, on the one hand, and the equipments on the other, were useless unless held and used together.

One of the purposes to be accomplished in the appointment of a receiver, was the preservation of the mortgaged property. This could only be done by repairing the track, and replacing the engines and cars when required. Money expended for either of these purposes becomes incorporated into the corpors of the mortgaged property. Money expended in repairing or rebuilding a bridge, and money expended in repairing a locomotive or replacing one that had been destroyed or worn out, both stand on the same footing. Such expenditures are necessary to the preservation of the mortgaged property, and enter into its corpors. The claim of the petitioners is, that after the road passed into the hands of the receiver, all its income and profits become their property by an absolute title, and, therefore, that the engines and other property purchased with such income and profits, vests in them, and do not become a part of the mortgaged property.

What are the creditors entitled to out of the income and profits of the railroad in the hands of a receiver? Clearly, only to the surplus after paying the expenses of conducting the business of the railroad, and preserving the property and keeping it in working condition.

The receiver has the power, and it is his duty, even without an order of the court, to apply so much of the income of the property as may be necessary to its care and preservation. He could do this in spite of the mortgagees. But in this case, where the order of the court directed him to use the road and carry on its business, and keep it in repair, there can be no question as to his right and duty. All outlays made by him in good faith, in the ordinary course of the business of the road, with a view to advance and promote its interest, and to render it profitable and successful, may be allowed in passing

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his accounts. Such outlay may include, not only the keeping the road and its buildings and rolling stock in repair, but also providing such additional accommodations and stock as the necessities of the business may demand: *Conodrey v. The Railroad Company*, 1 Woods, 331.

If the receiver has the right to do these things, to use the earnings in repairs and replacements of the road and its equipment, how can it be said that the mortgagees are entitled to the gross income? Can they demand that no money shall be expended in repairs? If they cannot, it is because they are not entitled to such part of the income as is necessary to keep the property in repair. They are entitled to the net income. That portion of the receipts which is expended in carrying on the business of the road, and in the preservation of the property, is not income. The income and profits is the surplus after all expenses and repairs and necessary replacements have been made. The mortgagees are entitled to that surplus, and nothing more.

These bondholders might as well claim that a bridge rebuilt by the receiver did not pass by the sale, as to claim that engines and cars put upon the road, and necessary to keep up its equipment and do its business, did not pass. Money so expended is no more income and profit than money paid to engineers and brakemen for their services.

There is no consideration which would justify the court in holding that the purchasers of the mortgaged property have not acquired title to the rolling stock bought by the receiver. It was as much a part of the mortgaged property as the iron rails put on the track by him. It enhanced the value of the property. The railroad brought a larger sum at the sale, by reason of the fact that this rolling stock had been placed upon it. The mortgagees have received the benefit of this property in the increased price which the railroad brought at the sale. They cannot keep the price of the property and claim the property too.

In accordance with these views, I must hold that the purchaser is entitled to the engines, cars and other personal property referred to in the petition, and that so much of the

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prayer of the petition as asks that the purchasers be required to deliver up said property, in order that it may be sold again, must be denied

**PETTUS & DAWSON AND WATTS & SONS V. THE GEORGIA
RAILROAD & BANKING COMPANY ET AL.**

A bill was filed in a state chancery court, by certain complainants, in behalf of themselves and other creditors, to assert and enforce a lien on certain railroad property which had been sold and was in the possession of the purchasers. After final decree by which the lien was established, and while a reference to the master was pending to ascertain the amounts due the creditors who sought the benefit of the decree, the purchasers of the railroad property against which the lien had been declared, paid the complainants their claims in full, and bought up and settled other claims entitled to the benefit of the decree. Counsel for complainants received no compensation for their services, in respect to these last-mentioned claims. They, therefore, filed their petition in the state chancery court, entitled of the original cause, against the purchasers of the railroad property, in which they claimed a lien on said property for their fees in the original case, and prayed that the defendants to the petition might be served with notice thereof, and allowed to answer the same; that an account might be taken of what was due the petitioners for their said services; that the defendants might be decreed to pay them for said services such sums as were just and equitable; that they might be declared to have a lien on said railroad property therefor; and if said sums were not paid, that the property might be sold to pay the same, and for general relief: *Held*, that this petition was not a mere graft upon or appendage to the original suit, but was, to all intents, a suit in equity; and as the case fulfilled all other requirements of the statute, it could be removed from the state to the federal court, by virtue of the act of March 3, 1875, for the removal of causes.

Heard upon motion to dismiss the suit, on the ground that it had been improperly removed from the state court.

The facts were as follows:

Branch Sons & Co., and other complainants, filed their bill in equity in the chancery court for Montgomery county, Alabama, on May 8, 1875, against The Montgomery & West Point railroad company of Alabama, and The Georgia Rail-

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road & Banking Company and the Central Railroad & Banking Company of Georgia, the two latter being corporations and citizens of the state of Georgia, and against other defendants. The bill was filed, not only for the complainants named therein, but for the benefit of all others who might be creditors of the said Montgomery & West Point railroad company, not secured by mortgage, who should come in and share the expenses of the suit.

The bill was a general creditors' bill, and its purpose was to establish, by the decree of the court, a lien upon the Montgomery & West Point railroad and its equipments, and upon all real and personal property used by or appurtenant to said railroad, prior to September, 1870, in favor of all the unsecured creditors of said Montgomery & West Point railroad company, in proportion to the amount of their claims.

The property sought to be subjected to said claims was of the value of \$1,200,000, and was within the jurisdiction of the said court.

On May 3, 1877, the chancery court rendered a final decree condemning all of said property to the payment of the claims of said Montgomery & West Point railroad company, and directed an account to be taken of the amounts due and owing to the complainants in the bill, and other creditors of said railroad company.

The register of the court gave notice to the creditors, requiring them to file their claims, and soon thereafter debts, consisting mainly of bonds and coupons, and in other forms, were filed in said court, to the amount of \$300,000. Before the time for presenting claims had expired, an appeal was taken from the decree to the Supreme Court of the state of Alabama, by which the decree was superseded. On May 20, 1878, the decree was affirmed by the Supreme Court, and by an order of said chancery court, dated June 1, 1878, the register was directed to proceed with the reference ordered by the final decree.

The register again gave notice to the creditors of the Montgomery & West Point railroad, to file their claims, and a large number of the creditors did come in and file their

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claims and seek the benefit of said final decree, and the claims thus filed amounted to \$250,000, in addition to those filed before the appeal. All these claims were just debts and liabilities of the Montgomery & West Point railroad company, all of them accrued before the filing of the bill, and were not secured by any mortgage, and were included in the debts of said company, mentioned in the bill of complaint, and every claimant had a lien for the debt due him on all the property of said company, held by it prior to the year 1870, and condemned by said decree to the payment of said debts.

On June 1, 1875, the Georgia Railroad & Banking Company, and the Central Railroad & Banking Company of Georgia, had possession of the railroad and other property which belonged to the Montgomery & West Point railroad company at the time of its dissolution in 1870, and continued to possess the same and claim it as their property, but the creditors of said last named company claimed that the said Georgia corporations held the same as trustees for them.

About November, 1878, the register of the chancery court began to execute the reference ordered by said final decree, and to take an account of the debts due from the Montgomery & West Point railroad company to persons who had filed their claims, and pending said reference, the said Georgia corporations paid the complainants named in the bill the claims in full, principal and interest, which they held against the Montgomery & West Point railroad company, and said complainants agreed to keep said payment secret from their counsel in said cause, until said Georgia railroad corporations could have time to settle or buy up all other claims against the Montgomery & West Point railroad company which had been filed in said cause, and said Georgia corporations, under this arrangement, went forward and acquired possession and control of all said claims which had been filed as aforesaid.

The said Georgia corporations, before they bought up or settled any of said claims, had active notice that the counsel for complainants claimed a lien on all the claims filed in said

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cause, and were entitled to be paid for their services as counsel, out of the property which had formerly belonged to the Montgomery & West Point railroad company, and which was held by said two Georgia corporations, and said latter companies, before buying and settling said claims, had entered into negotiations with the counsel of complainants to fix the amount of the compensation to which they were entitled for their services as such counsel.

The said Georgia corporations paid for all of said claims, except those of the complainants named in the bill, far less than their nominal value.

Other creditors of the Montgomery & West Point railroad company, who held claims to the amount of \$40,000, but who never filed their claims, after said decree had been affirmed by the Supreme Court, accepted and obtained the benefit of the services of complainants' counsel by demanding and receiving from said Georgia corporations a large part of their respective claims, in settlement and payment, with the condition imposed that they should not file said claims.

The counsel for complainants in said cause received compensation for their services, as such, rendered the original complainants and a few other creditors, but received no compensation for their said services from any other of said creditors.

The said Georgia corporations, before they paid off or settled any of said claims, had notice of the services rendered by said counsel for said creditors, and of the lien claimed therefor by the counsel of complainants.

The said Georgia railroad companies having obtained possession and control of all the claims filed, and claims not filed, as above stated, asserted their right to hold and own the same, without paying to the counsel of the complainants any compensation for their services in reference to said claims.

On this state of facts Messrs Pettus & Dawson and Messrs. Watts & Sons, who were the counsel for the complainants in said suit, filed, on April 15, 1878, their petition entitled of said suit, and addressed to the chancellor of said chancery

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court, in which they set out, in detail, the facts heretofore stated, and claimed that they, by reason of said facts, became the owners in equity as assignees of a part of each one of said claims, on account of which they had not been paid for their services.

They further alleged that, after deducting all the compensation they had received for their said services, there was justly due to them large sums on account of their services in said suit, to creditors who came in and received the benefit of such services without making any compensation therefor; that at the time said bill was filed, the said claims against the Montgomery & West Point railroad company, not secured by mortgage, were not worth exceeding ten cents on the dollar, and were considered by the holders thereof to be of little value; but by the services of said counsel, said claims, after the affirmance of said decree, became of par value. They claimed, further, that their said services were worth twelve to fifteen per cent of the full value of said claims.

The petition repeatedly referred to the record of said equity cause, on file in the said chancery court. It prayed that the said Georgia Railroad & Banking Company, and the said Central Railroad & Banking Company of Georgia, might be made parties defendant to the said petition, and have notice thereof, and be allowed to answer the same, and that they might be required to produce before the register of the court all the claims against the Montgomery & West Point railroad company, which they had bought or settled, that an account might be taken of the amounts justly and equitably due to the petitioners for the services rendered by them as solicitors in said cause, for the benefit of the creditors of the Montgomery & West Point railroad company, who accepted and received benefit from said services, that, if necessary, an account might be taken of the debts owing by the said Montgomery & West Point railroad company at the date of said final decree, and petitioners be declared to be entitled to such parts of each of said claims (except those claims in reference to which their services had been compensated), as might be just and equitable; that said Georgia corpora-

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tions might be required to pay to the petitioners such sums as might be found reasonably due them for services rendered in said cause, which had not been paid for, and that petitioners might be declared to have a lien on all the property mentioned in the bill of complaint, which formerly belonged to the said Montgomery & West Point railroad company, and was then in the possession of the said Georgia corporations, for the amounts found due to petitioners, and that if said sums were not paid, that said property might be sold, under the decree of the court, to pay the same, and for general relief.

This petition was sworn to by one of the petitioners, and an affidavit averring the non-residence of the parties defendant having been filed, the chancery court ordered that they be brought into court by publication, and directed that defendants plead answer or demur thereto within thirty days after service.

The defendants to this petition, on April 24, 1879, filed their petition, accompanied by a bond executed according to law, in which they prayed for the removal of the cause instituted by the petition to this court.

The prayer of this petition was denied, on the sole ground that the suit was not one which could be removed, under the acts of congress.

Thereupon the defendants to the petition filed a transcript of the petition and the proceedings thereon, and the same was docketed in this court as the suit of *Pettus & Dawson and Watts & Sons v. The Georgia Railroad & Banking Company, and the Central Railroad & Banking Company of Georgia*.

The petitioners, thereupon, moved to dismiss the cause out of this court, and on this motion the case was heard.

Messrs. Thomas H. Watts, Walter L. Bragg and Wm. S. Thorington, for the motion.

Mr. Henry C. Semple, contra.

Woods, Circuit Judge. The removal attempted in this case is claimed to be by virtue of the act of March 3, 1875.

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It is conceded that, the petition and bond for removal were sufficient in form and substance, that they were filed within the time limited by the statute, and that the transcript of the record of the state court was filed in this court "on or before the first day of its then next session," as required by law.

The ground, and the only ground of the motion to dismiss is, that this is not such a suit as can, under the act of congress, be removed to this court.

The second section of the act of March 3, 1875 (18 Stat., 470), declares "That any suit of a civil nature at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * and in which there shall be a controversy between citizens of different states, * * * either party may remove said suit into the circuit court of the United States for the proper district, and where, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district."

The matter in dispute, in this petition, largely exceeds the sum of five hundred dollars, exclusive of costs, the petitioners are all citizens of Alabama, and the defendants to the petition are all citizens of Georgia; it is, therefore, a controversy between citizens of different states; the petitioners and the defendants are alone interested in the controversy, therefore it can be fully determined as between them. It is clear, therefore, that the controversy set out in the petition is one proper for removal, if the matter removed is "a suit of a civil nature at law or in equity." The counsel for the petitioners assert that it is not a suit, but a mere incidental proceeding, an appendage to, or graft upon, a suit still pending in the state chancery court.

In support of this view they cite the following cases: *West v. Aurora City*, 6 Wall., 139; *Bank v. Turnbull &*

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Co., 16 Wall., 190, and *Webber v. Humphreys*, 8 Central Law Journal, 417.

The case of *West v. Aurora City* arose on an attempted removal of the case from the state to the federal court, under the twelfth section of the judiciary act, which restricts the right to remove to the defendant. Under the Code of the state of Indiana, where the suit was pending, the defendant was allowed, with his defense, to set forth counter-claims, or set-offs. In this case the suit appeared to be upon interest coupons on bonds issued by the defendant. The defendant having made defense by answer under the Code, filed, by leave of the court, three paragraphs, setting up new defensive matter, and prayed an injunction against the plaintiffs, to restrain them from proceeding in any suit on the coupons or bonds, etc., and for a decree that the bonds be delivered up. Thereupon the plaintiff discontinued his suit, and assuming that the new paragraphs of the answer would remain in substance a new suit against him, filed his petition for the removal of the cause to the federal court, and it was removed accordingly, but was afterwards remanded by the federal to the state court.

In passing upon the propriety of this action of the circuit court, the Supreme Court said that the circuit court was clearly right in its action. The right of removal is given only to a defendant who has not submitted himself to the jurisdiction; not to an original plaintiff in a state court, who, by resorting to that jurisdiction, has become liable, under the state laws, to a cross-action. And it is given only to a defendant who promptly avails himself of the right at the time of appearance, by declining to plead, and filing his petition for removal.

It is evident that this cause, decided under the twelfth section of the judiciary act, is not an authority applicable to the matter in hand.

In the case of *Bank v. Turnbull & Co.*, *supra*, there was an execution issued upon a judgment recovered by the bank against one Thomas, which was levied on property claimed by Turnbull, who were allowed to intervene and set up

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their ownership, and a jury was ordered to be called to decide whether the property levied on belonged to Turnbull or Thomas.

This issue was removed to the United States circuit court, and, after final judgment, to the Supreme Court, and the question was presented to the Supreme Court, whether it was a suit properly removable, under the act of March 2, 1867 (14 Stat., 558), for the removal of causes.

The Supreme Court held that the matter removed "was merely auxiliary to the original action, a graft upon it, and not an independent and separate litigation. * * * The contest could not have arisen but for the judgment and execution, and satisfaction of the former would at once have extinguished the controversy between the parties."

In the case of *Webber v. Humphreys, supra*, a Missouri statute provided that if no property of a corporation could be found to satisfy an execution issued against it, then such execution might be issued against any of the stockholders to the amount unpaid on their stock, provided that execution should not issue against a stockholder except by order of the court, made upon due notice to him.

Such a motion was made in that case, and the court held that it was not a suit which could be removed from the state to the federal court.

The case of *Bank v. Turnbull & Co.*, and the case just referred to, were clearly not independent suits. They could not be severed from the case to which they belonged. In both cases they were merely proceedings to regulate and control the processes of the court in the case to which the proceedings appertained.

The question then recurs, is the petition in this case a suit? In my judgment, it has all the necessary elements of a bill in equity, and is a bill in equity. If the purpose of the petition in this case were to obtain an order of the court that the petitioners' fees for services might be paid out of the property of their clients, which their services had secured and brought into court, or which the court had in its possession, there might be some ground for the idea that this was a

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graft on the main suit. But that is not the object of the petition. The petitioners are asserting a claim for their fees, not against their own clients, but, in effect, against the property of the opposite party. The clients of the petitioners were primarily liable for the petitioners' fees. Their claims have been satisfied, but they have failed to pay the fees due the petitioners. The attempt is, in effect, to subject the property of the opposite party to the payment of the fees of petitioners. This surely is not a graft on the main case.

The petitioners assert a lien on the property of defendants. They declare that defendants are trustees for them, and they charge fraud practiced by defendants to their damage and injury. They seek to enforce the lien and trust. They pray for an account of the amount due to them by reason of the trust. Seek to enforce the lien by a sale of the property on which it rests, and they pray that defendants may answer, and for general relief, and that notice may be served on the defendants. An order to bring defendants in by publication was actually taken.

Here are all the essential elements of a bill in equity. See *Stickney, Assignee, v. Wilt*, 23 Wall., 150, where a proceeding, not as much like a suit in equity as this, was declared to be such.

This case might have been brought as an independent suit, either in the state chancery court or in this court. The full settlement and adjustment of the original claim would not settle or adjust the controversy between these parties. This suit had its origin in the original case, but is not a part of it, or dependent on it.

The case falls within the rule laid down in *West v. Aurora City, supra*: "It is a suit regularly commenced by a citizen of the state in which the suit is brought, by process served on a defendant who is a citizen of another state.

This court, if it should proceed to a decree in favor of the petitioners, and establish their lien on the property of defendants, would not necessarily interfere with the property in the possession of the state court.

If this court establishes the claim and lien of the petition-

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ers, that lien can be enforced as soon as the hand of the state court is taken from the property ; or, the petitioners, having established their lien in this court, could propound their claim in the state court, if that court were proceeding with the administration of the property.

We are satisfied that this is a new cause, entirely independent of the original case, that could be commenced and prosecuted after the original case had been entirely disposed of and ended. That it is a suit in equity between new parties on a new cause of action, and as it fills all other requirements of the statute, it is a cause proper to be removed to this court.

The motion to dismiss must, therefore, be overruled.

NORTHERN DISTRICT OF ALABAMA.

APRIL TERM, 1878.

RICHARD H. WILSON, ASSIGNEE OF RICHARD PREWETT, v.
RICHARD PREWETT ET AL.

1. To make an ante nuptial settlement void as a fraud on creditors, both parties to the settlement should concur in, or have notice of the intended fraud.
2. The husband and wife, parties to such a settlement, are deemed, in the highest sense, purchasers for a valuable consideration.
3. But if the settlement is not *bona fide*, the fact that it is made for a valuable consideration will not save it.
4. A marriage settlement cannot be made a cover for fraud. If the purpose is to delay or defraud creditors, and both parties are cognizant of it, the consideration of marriage will not support the settlement.
5. If the amount of property settled is extravagant, or grossly out of proportion to the station or circumstances of the husband, and he is embarrassed by debt, and the other party knows it, this, of itself, is sufficient notice of fraud.
6. To ascertain the purpose of the grantor in a marriage settlement, evidence of fraudulent transfers by him to other persons at or about the time of the settlement, is admissible.
7. Actual knowledge, on the part of the prospective wife, of the fraudulent purpose of the grantor in the marriage settlement, is not necessary to avoid the deed. A knowledge of facts sufficient to excite the suspicions of a prudent person and put her on inquiry, amount to notice, and are equivalent to actual knowledge.
8. P. was indebted in the sum of about \$90,000, and owned property worth about \$50,000. In alleged consideration of marriage, he conveyed to his prospective wife property of the value of \$32,776, and in addition thereto, he conveyed to her other property of the value of \$13,300, to be held by her in trust for two favored creditors. This conveyance included all his property, except three thousand six hundred and eighty acres of land worth two dollars per acre, which was covered by a deed of earlier date which had never been canceled. The deed of marriage settlement left \$70,000 of debts unprovided for. The prospective wife knew, before the marriage and

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before the execution of the marriage settlement, that P. was embarrassed by his debts, and for that reason had demanded an ante-nuptial settlement before she would consent to marry him. *Held*, that the deed of settlement was in fraud of creditors and void.

9. Where a deed in favor of two persons is obtained by the fraud of one, although without the privity of the other, the deed is void as to both.

IN EQUITY. Heard on pleadings and evidence for final decree.

The purpose of the bill was to obtain a decree of the court, setting aside as fraudulent, and null and void, a marriage settlement, made on April 27, 1866, by the defendant Richard Prewett, on Josephine Prewett, whom he afterwards, on May 6, 1866, married.

Prewett was fifty-eight years of age. About the first of February, 1866, he proposed marriage to Josephine Prewett, who was the widow of his nephew, and was twenty years of age, and childless, and was the owner of property worth less than \$1,000. Josephine Prewett consented to marry him. A short time afterward, for what reason the evidence did not disclose, she wrote Prewett, withdrawing her consent to marry him. About the first of April following, Prewett renewed his addresses. Josephine again agreed to marry him, this time on condition that he made a settlement of property upon her, in consideration of the marriage. To this Prewett assented, and agreed to settle on her a large amount of real estate and some personal property, but without specifying any particular property. On April 27, Prewett executed the deed of marriage settlement, which is attacked in this case. It conveyed to Josephine Prewett, in consideration of the contemplated marriage, real estate which it is conceded was worth \$30,000, and personal property worth \$2,776. The lands lay partly in Franklin county, but mainly in Lawrence county, Alabama. The personal property conveyed embraced live stock, farming utensils, household furniture and seed cotton, all on the land conveyed.

At the date of the marriage settlement, Prewett was indebted in the sum of \$90,000. Property of the value of \$13,300, in addition to that already mentioned, was con-

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veyed by the deed of settlement, to be applied to the payment of \$18,000 of this indebtedness. No other provision was made by Prewett for the payment of his debts.

The deed of settlement included all the property to which Prewett had any title, except 3,680 acres of land which he had previously conveyed, by deed, to one Bates, his son-in-law, as will be hereafter more fully stated, and personal property of the value of \$600 or \$700.

On November 20, 1865, Prewett had, by deed of that date, conveyed to his said son-in-law, James R. Bates, for the recited consideration of \$25,982, 4,400 acres of land, which included the 3,680 acres of land just mentioned. The consideration was made up of an account said to be due to Bates from Prewett, amounting to about \$18,000, and the residue of the purchase price was to be paid to Prewett in money. The account was for eleven years' services as overseer, with interest computed from the close of each year, eight years' hire of a slave, with interest computed in the same manner, and the price of a horse, \$250, and \$220 interest thereon. There were no payments or credits on the account.

Prewett testified that this deed, some time after its execution, and before the execution of the marriage settlement, was returned to him by Bates, and their contract in reference to said 4,400 acres of land rescinded. Bates, however, did not re-convey the land to Prewett, nor was the deed therefor canceled even, and Prewett must have considered the deed as of some effect, for in June, 1866, after the marriage settlement, he returned no property of his own for taxation, so that the marriage settlement included all the property of Prewett not covered by deeds of conveyance, except \$600 or \$700 worth of personal property.

On July 16, 1866, Prewett, by deed of that date, conveyed to Bates 3,680 acres of land, parcel of the 4,400 acres mentioned in the deed of November 20, 1865, in satisfaction of the said debt due from Prewett to Bates, on the account before mentioned, the amount of which was stated by the

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parties at \$18,560.80. These lands, it was agreed, were worth \$2 per acre.

On May 6, 1866, Richard and Josephine Prewett were married. On June 25th following, Prewett gave in for taxation, in the name of his wife, all the lands embraced in the marriage settlement, and returned no property whatever of his own for taxation.

On July 16, 1866, the day when the last conveyance was made by Prewett to Bates, Josephine Prewett made her last will, whereby, in the event of her dying without issue by her then husband, she devised and bequeathed to one Hodges, all her estate, real and personal, in trust, to pay over to Richard Prewett, her husband, all the annual rents, issues and profits thereof, and in case of her dying leaving issue of her said marriage with Richard Prewett, she devised to the said Hodges a child's share of her estate, real and personal, in trust for the said Richard Prewett, upon the like terms and conditions as she had devised her entire estate, in case of her dying without issue living of her marriage with said Richard Prewett.

Prewett testified that he was not informed of the contents of this will until 1870.

On December 29, 1868, Richard Prewett filed his petition in bankruptcy, and the only property returned in his schedule was his wearing apparel, valued at \$50.

In her answer, filed December 17, 1866, to a bill in equity, brought against her and others, in the state chancery court, to set aside this marriage settlement made on her by Richard Prewett, Josephine Prewett said that "at the time of the execution of said deed (the marriage settlement), as well as at the time she contracted to marry the said Richard, she knew that he was embarrassed and indebted, but to what extent, and to whom, she did not know, and does not now know. * * * It was because of her knowledge of the embarrassed condition of the said Richard that she stipulated at the time of her engagement of marriage aforesaid, for the promises, covenants and undertakings of the said

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Richard, particularly set out and described in the deed of conveyance aforesaid."

The answers of both Richard Prewett and Josephine Prewett, which are under oath, deny that there was any fraudulent purpose in the execution and delivery and acceptance of the deed of settlement, and aver the entire *bona fides* of the transaction.

Messrs. S. D. Cabiniss and F. P. Ward, for complainant.

Messrs. L. P. Walker, D. D. Shelby, Milton Humes and Geo. S. Gordon, for defendants.

WOODS, Circuit Judge. The attack on the marriage settlement is made by the assignee in bankruptcy of Richard Prewett, representing his creditors, and the charge is, that the settlement was made by Richard Prewett, and accepted by Josephine Prewett, with the purpose to hinder, delay and defraud the creditors of the former, and is, therefore, null and void. The bill prays that the deed may be so declared, and the property described therein turned over to the assignee, and by him administered as assets of the bankrupt estate.

The principles of law which apply to a case like this are well settled.

"Nothing can be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. If the settler alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it. Marriage, in contemplation of law, is not only a valuable consideration to support a settlement, but is a consideration of the highest value, and from motives of the soundest policy, is upheld with a steady resolution. The husband and wife, parties to such a contract, are, therefore, deemed, in the highest sense, purchasers for a valuable consideration, and so that if it is *bona fide* and without notice of fraud, brought home to both sides, it becomes unimpeachable by creditors. Fraud may be imputable to the parties, either

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by direct co-operation in the original design at the time of its concoction, or by constructive co-operation from notice of it, and by carrying the design, after such notice, into execution:" *Magniac v. Thompson et al.*, 7 Pet., 348. See, also, 1 Bishop on Married Women, sec. 775; Co. Litt., 9 (6); Schouler's Dom. Rel., 263; *Ford v. Stuart*, 15 Beav., 493; *Nairn v. Prowse*, 6 Vesey, Jr., 752; Peachey Mar. Settl., 56; *Armfield v. Armfield*, 1 Freeman's Chy. R., 311; *Sterry v. Arden*, 1 Johns. Ch., 261; *Sterry v. Verplank*, 12 Johns., 536; *Johnson v. Dillard*, 1 Bay., 232, 234; *Huston v. Cantrel*, 11 Leigh, 136; *Tunno v. Trezevant*, 2 Dessaus, 264; *Whelan v. Whelan*, 3 Cow., 537.

In *Cadogan v. Kennett*, 2 Cowp., 432, which was an action of trover brought by the plaintiff's trustees, under the marriage settlement of Lord Montford, against the defendant, who was a judgment creditor of Lord Montford, and the sheriff's officers, to recover certain goods taken by them in execution, Lord Mansfield said: "If the transaction be not *bona fide*, the circumstance of its being done for a valuable consideration will not alone take it out of the statute. I have known several cases where persons have given a full and fair price for goods, and where the possession was actually changed. Yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent and void." * * "The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick or contrivance to defeat creditors."

"A man who is indebted may, on his marriage, make a settlement of his property, provided the settlement is made honestly and in good faith, and the wife's knowledge of his indebtedness will not alone render it void. It is, however, clearly established that marriage cannot be made the means of committing fraud. If there is intent to delay, hinder or defraud creditors, and to make the celebration of a marriage part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support the settlement:" Bump. on Fraudulent Conveyances, 308; citing *Bulmer v. Hunter*, L. R., 8, Eq., 46; *Ex parte*

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McBurnie, 1 DeG., M. & G., 441; *Betts v. Union Bank*, Harris & G., 175; *Campion v. Cotton*, 17 Ves., Jr., 264; *Richardson v. Horton*, 7 Beav., 112; *Colombine v. Penhall*, 1 Sm. and Gif., 228.

Notice of the fraud may be inferred from the facts and circumstances of the settlement: *Colombine v. Penhall* and *Bulmer v. Hunter*, *supra*.

If the amount of property settled is extravagant, or grossly out of proportion to the station and circumstances of the husband, this, of itself, is sufficient notice of fraud: *Ex parte McBurnie*, *supra*; *Croft v. Arthur*, 3 Dessau, 223.

In an able opinion, in the case of *Simpson v. Graves*, reported in Riley's Equity Cases, 232, Justice Nott, of South Carolina, says: "There is no case that I have seen, where a man has been permitted to make an intended wife a mere stock to graft his property upon, in order to place it beyond the reach of his creditors. A marriage settlement must be construed like every other instrument. The question may always be raised, whether it was made with good faith, or intended as an instrument of fraud. Even though marriage may be a part of the consideration, fraud may be mingled with it, and that may be as well inferred from internal evidence as from circumstances *aliunde*.

"Marriage is put on the footing of a pecuniary consideration. And it is said, if a person sell his property for a full consideration and squander the money, his creditors have no redress. From which it is inferred, that marriage will afford the same protection. But, in the case of a *bona fide* sale, the seller has parted with his property, the purchaser has parted with his money, and the law will presume that the object was the payment of his debts. But the purchaser is not answerable for the misapplication of the money. It is not so with a marriage settlement. The seller does not, in fact, part with his property. It is still intended for his own enjoyment. Neither does he receive in return anything that will satisfy his creditors. His wife will not be received in payment of his debts. It is not to be understood that because marriage is equivalent to a pecuniary consideration, it is to

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be considered in the nature an actual purchase. A settlement is not intended as the price of the wife, but as a provision for a family. It must, therefore, be reasonable, and with a due regard to the rights of others. A creditor has an equitable claim to the property of the debtor."

Applying these rules of law to the facts of this case, it is to be determined whether the purpose of Richard Prewett, in making the conveyance to the woman whom he proposed to marry, was to hinder, delay or defraud his creditors, and, if it were, whether Josephine Prewett had notice of such purpose before the marriage.

As to the first question, the evidence leaves no doubt in my mind touching the fraudulent intent of Richard Prewett. To ascertain the intent of the settler we are authorized to consider fraudulent transfers to other persons at or about the time of the transfer assailed: Bump on Fraudulent Conveyances, 545, and numerous authorities there cited.

The evidence shows that Prewett had been insolvent ever since the close of the late war; that he was largely insolvent on November 20, 1865, when he made a conveyance to his son-in-law, Bates, of 4,400 acres of land. The consideration named in this deed was \$25,982 in money. Prewett testifies that this was not the real consideration, but that it was the discharge of his debt to Bates, and the payment by Bates of the residue in money. He further says, that at the date of this deed no formal account was stated between him and Bates, but the debt was supposed to be \$17,000 or \$18,000; but that afterwards, in July, 1866, the account was stated, which showed that there was due from Prewett to Bates the sum of \$18,560.80. The account is in evidence, and it bears upon its face the ear-marks of a trumped-up account. There is not a word of evidence to show that any contract had ever been made by Bates for his own services, or for the hire of his slave, or for the sale of his horse; that any note had ever been given, or any account kept. In fact, Prewett says the account was never stated till eight months after the date of the deed of November 20, 1865. It is a remarkable fact, too, that for a period of eleven years this account should be

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allowed to run, without a single credit or payment. That such an account could be *bona fide* seems incredible. And yet, upon such an account, at that time uncertain in amount, and without the payment of a cent of money, and without taking from him any evidence of debt, Prewett conveys lands to Bates which he estimated to be worth \$26,000. If this were the deed assailed, no court would have any hesitation in pronouncing it fraudulent. We find, then, that in November, 1865, Prewett, being hopelessly insolvent, is attempting to cover up a large part of his property by a fraudulent deed to his son-in-law.

For some reason the device was abandoned, and the deed returned to Prewett, but there was no re-conveyance of the land to him, and in the following April Prewett executed the marriage settlement. He owed his creditors \$90,000. His available means amounted to little over \$50,000. Of these means he devoted \$13,000 to the payment of two favored creditors, he retained lands worth about \$7,000, which must have been under the cloud of the deed of November, 1865, which was never canceled, and which he afterwards conveyed to his son-in-law, Bates, in payment of the account heretofore referred to, and he conveyed to his intended wife all the residue of his property, worth, according to the agreed facts, \$32,776, leaving about \$70,000 of debts unprovided for.

The mere statement of these facts reveals the purpose of Prewett. He commenced his attempts to defeat his creditors, by a fraudulent deed, in November, and he closes by a deed by which he, in effect, secures to himself the enjoyment of more than three-fifths of his property, by a conveyance to his intended wife, and leaves creditors to the amount of \$70,000 entirely unprovided for. The effect of this deed was to hinder, delay and defraud his creditors, who were not mentioned in the marriage settlement, for it conveyed all the property which he had not before conveyed, and left such creditors nothing. Prewett must be held to know what he was about, and to intend the natural consequences of his act. The pretense that he was insolvent in April, 1866, but did

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not know it, is absurd. He owed \$90,000, which was bearing interest, and he had but \$50,000 of property to pay it with. The disposition of \$33,000 of this property, all that he had not covered by a former deed, in such a way as to place it beyond the reach of his creditors, while, at the same time, he received no pecuniary equivalent which he could apply to his debts, shows clearly his purpose to defraud his creditors.

Prewett was, at the date of the settlement, embarrassed and largely insolvent. The property settled on his proposed wife was out of all reasonable proportion to his means, even if he had owed no debts. The property settled was equitably the property of his creditors. The deed of settlement conveyed, substantially, all his property not covered by a previous conveyance which was still in force, and it left creditors to the amount of \$70,000 entirely unprovided for. When, in December, 1868, Prewett filed his schedule in bankruptcy, he reported his wearing apparel, valued at \$50, as his only assets. We find, then, that the fraud upon the creditors, designed and consummated by Prewett, was gross and palpable.

But fraud brought home to the settler is not of itself sufficient to avoid the settlement. The grantee must participate in the fraud, or at least have cognizance of it. It is, therefore, to be inquired, whether Josephine Prewett had, before her marriage with Richard Prewett, notice of the fraud which Prewett contemplated, and which he carried into execution by means of the marriage settlement.

We know, from her own answer, that before the execution of the marriage settlement she was advised that Prewett was indebted, and that he was embarrassed, and it was, as she says, on account of his indebtedness and embarrassment that she demanded a marriage settlement before she would consent to marry him.

Why did she make this demand? Clearly because she feared that the creditors of Prewett might sweep away his property and leave her destitute.

With this knowledge Prewett presents to her a convey-

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ance, which transfers to her property worth \$32,776. Could she, *bona fide*, knowing that Prewett was indebted and embarrassed, accept a conveyance for so large a sum? Could she shut her eyes and say she did not know the extent of his debts, did not know of his fraudulent purpose, and, therefore, she received the deed in good faith?

Actual knowledge of the fraudulent intent is not necessary. A knowledge of facts sufficient to excite the suspicions of a prudent man or woman, and to put him or her on inquiry, amounts to notice, and is equivalent to actual knowledge in contemplation of law: *Atwood v. Impson*, 5 C. E. Green, 150; *Tantum v. Green*, 6 C. E. Green, 364; *Jackson v. Mather*, 7 Cow., 301; *Smith v. Henry*, 2 Bailey, 118; *Mills v. Howeth*, 19 Texas, 257.

It has even been held that the means of knowledge, by the use of ordinary diligence, amounts to notice. *Farmers' Bank v. Douglass*, 11 Sines & M., 469. But in this case it is not necessary to go so far. The indebtedness and pecuniary embarrassment of Prewett, and the large estate conveyed by the deed of settlement, put Josephine Prewett on inquiry, and she is chargeable with knowledge of every fact which she could have learned on inquiry. She might have learned all that the evidence in this case discloses about the amount of Prewett's debts and property, and such knowledge would have made clear Prewett's fraudulent purpose. She is, therefore, chargeable with notice of the fraud, and her acceptance of the deed of settlement, after such notice, makes her a party to the fraud, and renders the marriage settlement null and void.

The creditors of Prewett, whose *bona fide* debts were provided for by the marriage settlement, can take no benefit from the fraudulent instrument. When a deed in favor of two persons is obtained by the fraud of one, although without the privity of the other, the deed will be void as to both: *Whelan v. Whelan*, 3 Cow., 537; *Hunt v. Bass*, 2 Dev. Eq. R. (N. C.), 292; *Huguenin v. Baseley*, 14 Ves. Jr., 273; *Townsend & Brothers v. Harwell*, 18 Ala., 301.

Although they had no notice or knowledge of the fraud

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contemplated by Prewett, yet the fact that the grantee, under whom their rights are claimed, not only had notice of the fraud, but was a beneficiary under the fraudulent deed, avoids the instrument as to the beneficiary as well as to the grantee.

The result of these views is, that the marriage settlement made by Richard upon Josephine Prewett, must be declared void for all purposes, and the property conveyed thereby turned over to the assignee in bankruptcy for administration.

ROBERT H. WILSON, ASSIGNEE OF FLEMING JORDAN, v. LUCY JORDAN AND FREDERICK B. MOORE.

1. J., who was insolvent, conveyed to his wife real and personal property of the value of \$7,700, for a consideration estimated at \$1,537. *Held*, that the consideration was so grossly inadequate as, under the circumstances, to establish conclusively the fraudulent character of the conveyance.
2. A testator devised a large estate to various legatees to the exclusion of the heir. The heir filed a bill, in which the validity of the will was assailed. Pending this bill, the executor and the heir entered into a contract with each other, to the effect that, in case the will should be set aside, the executor was to pay the heir a certain fixed sum out of the estate and retain as his own all the residue, to the exclusion of the legatees under the will. *Held*, that such a contract was a flagrant breach of trust by the executor, and was against public policy and void.

IN EQUITY. Heard upon pleadings and evidence for final decree.

The bill was filed by the complainant as assignee in bankruptcy of Fleming Jordan, to set aside as fraudulent two deeds made by Jordan on September 29, 1866, one to his wife, Lucy Jordan, and the other to Frederick B. Moore. Both these deeds conveyed personal as well as real property. They were attacked by the complainant on the ground that the consideration for the conveyances was grossly inadequate, and that they were executed to hinder, delay and defraud the creditors of Jordan.

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The consideration of the deed to Lucy Jordan was the release of her inchoate right of dower in the lands conveyed by her husband to Moore, and the consideration of the conveyance to Moore was the cancellation of a debt due to Moore from Jordan, evidenced by certain bills of exchange of which Jordan was the drawer, and Moore the holder, amounting to \$28,000.

Messrs. S. D. Cabiniss, F. P. Ward and David P. Lewis, for complainant.

Messrs. L. P. Walker, D. D. Shelby, Milton Humes and Geo. S. Gordon, for defendants.

Woods, Circuit Judge. The evidence shows conclusively, indeed it is not controverted, that on September 29, 1866, the day when the deeds to Frederick B. Moore and Lucy Jordan were executed, Fleming Jordan was largely insolvent. At that time he owed at least \$80,000, and all his property was not worth more than \$25,000 or \$26,000. On the day just mentioned he conveyed, substantially, all his real and personal property to Frederick B. Moore, and to his wife, Lucy Jordan, and others.

Lucy Jordan knew that her husband was insolvent at the date of the conveyance to her, for she so testifies.

The real estate conveyed to her by the deed in question is estimated by one witness, Joseph C. Bradley, at \$5,000, by another witness, Larkin A. Warthan, at \$9,550, and it was valued for taxation for the year 1867, by Lucy Jordan herself, at \$9,000, and taxes paid by her on that valuation.

Two items of the personal property conveyed by said deed, namely, six mules and two hundred barrels of corn, are estimated by the witness Warthan to be worth \$2,020, the mules \$1,020, and the corn \$1,000. Besides these articles of personal property, the deed to Lucy Jordan also conveyed to her one wagon and gear, fifteen head of cattle, twenty head of hogs, one horse-cart, one rockaway and harness, and all the household and kitchen furniture at the residence of the grantor. Lucy Jordan, in her evidence, puts the value of the mules at \$900, and other witnesses put the price of corn at

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from sixty to seventy-five cents per bushel. According to the lowest estimates made by the witnesses, the mules and corn alone were worth \$1,500.

The return of property for 1867 made by Lucy Jordan for taxation, shows that she returned for taxation cattle over five head in number, valued at \$150, household and kitchen furniture in excess of \$300, valued at \$700, and vehicles, not excluding those used for agricultural purposes, valued at \$50. The value of these articles amounted, in the aggregate, to \$1,200. It is true, it is not directly shown that they were the same articles conveyed by the deed of Fleming Jordan the year before, but the inference that they are so is not a forced one. If this property, returned by Lucy Jordan for taxation in 1867, was not the property conveyed to her by Fleming Jordan in 1866, it certainly stood her in hand to show it. It was a fact peculiarly within the knowledge of herself and husband, yet neither of them have attempted to deny the identity of the property.

Estimating the corn and mules at \$1,500, and the other personal property conveyed at \$1,200, the estimate put upon it by Lucy Jordan for taxation, the value of the personal property conveyed by the deed of September 29, 1866, foots up at \$2,700.

Estimating the mules and corn at the price named by Warthan, to wit, \$2,020, the entire value of the personal property conveyed foots up \$3,220.

There are but two estimates of the value of the real estate conveyed to Moore, in which Lucy Jordan released her dower. One is that of Warthan, who placed it at \$10,500, and the other of Joseph C. Bradley, who placed it at \$7,000. The only evidence to show the residue of the lands conveyed by Fleming Jordan to Warthan, Lightfoot, Reynolds and Larkins, was the sum for which Jordan testifies he sold them at that time. These lands sold for \$2,225.

Therefore, taking Warthan's estimate, the entire value of the lands in which Mrs. Jordan released her dower, as a consideration of the conveyance to her, was \$12,750; according to Bradley's estimate, was \$9,225.

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Now, what was the inchoate right of dower of Lucy Jordan, in other lands, worth on September 29, 1866. The statute of Alabama has fixed the utmost limit to its value. If, at the date just named, Mrs. Jordan had actually been a widow eighteen years of age and in perfect health, the present value of her vested dower estate in these lands would have been, according to the law of Alabama, only one-sixth of their value, in fee simple. See Walker's Rev. Code, secs. 2229, 2230, 2231.

According, therefore, to Warthan's estimate of the value of the lands, Mrs. Jordan's dower therein, if she had been a widow in youth and health, would have been \$2,125; according to Bradley's, it would have been \$1,537. When it is remembered that on September 29, 1866, the date of her release of dower, Mrs. Jordan's husband was living, that he was only five years her senior, and that she was fifty-seven years of age, the value of her inchoate right of dower almost entirely disappears.

But suppose it to be worth what it would have been if she had been actually a widow eighteen years of age, and in good health, how does its value compare with what she received for it? According to the highest estimate of the value of her dower, and the lowest estimate of the value of the personal property only, conveyed to her by the deed of September 29, 1866, she received in personal property alone \$575 more than her dower was worth.

Taking Bradley's estimate of the lands in which dower was released, the mules and corn alone, at the lowest estimate put upon them by any witness, came within \$37 of paying all that her dower was worth, if she had been actually a widow and only eighteen years old.

The truth is, that the inchoate right of dower of Mrs. Jordan, in the lands conveyed by her husband, was almost worthless. If we are to exercise our own judgment in such matters, we know that, if put up to sale, it would have brought nothing. The purchasers of the land would doubtless have paid a small sum for it, but not near one-sixth of the value of the estate in fee.

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These facts show how grossly inadequate was the consideration paid by Mrs. Jordan for personal property worth from \$2,000 to \$3,000, and for lands estimated at from \$5,000 to \$9,550. When we reflect that at the time of this transaction Jordan owed more than three times what he had means to pay, and that he knew, and his wife knew, that he was insolvent, and that he, on the day he made the conveyance to his wife, conveyed everything else he owned in the world to his brother-in-law, Moore, it needs no further consideration to establish the fraudulent nature of the deed to Mrs. Jordan. So gross an inadequacy of consideration, taken in connection with the insolvency of Jordan, is alone sufficient to show the fraud of the conveyance: *Kempner v. Churchhill*, 8 Wall., 362; *Ratcliff v. Trimble*, 12 B. Monroe, 32; *Borland v. Mayo*, 8 Ala., 104; *Prosser v. Henderson*, 11 Ala., 484.

The release of her dower was more than thrice paid for by the personal property which she received, and the conveyance of the land to her was left without any consideration whatever.

Taking any of the estimates of the value of the property, the consideration which Mrs. Jordan received for the release of her dower, was nearly equal in value to the entire estate in fee in which she released her dower.

We think the facts clearly show that the difference between the property conveyed to her and the consideration paid "was so great as to shock the common sense of mankind, and furnish in itself conclusive evidence of fraud:" *Hunt v. Sorrell*, 11 Ala., 400.

I have thus far considered the case as if Fleming Jordan had such title in the lands conveyed to Moore as gave his wife a right of dower therein in case she survived him. But that Fleming Jordan had such title is strenuously denied by the complainant.

To entitle Mrs. Jordan to dower, her husband must have held the legal title during coverture, or must have had a perfect equity therein: Walker's Rev. Code, sec. 1624.

Jordan had no legal title. On his own showing he had

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only a contract for a deed. Had he such an equity as entitled his wife to dower?

The facts about this contract, as claimed by the complainant in this case, were these: Fleming Jordan was one of the executors of the will of Fleming J. McCartney, deceased. Mathew H. Bone and wife, the latter being the only heir of McCartney, having filed their bill against Jordan, as executor, and others as legatees under the said will, Jordan entered into a contract, by which it was agreed between him and Bone and wife, that in the event the will should be set aside and the probate revoked, Bone and wife were to take \$40,000 of the estate, and sufficient in addition to pay off certain sums in which they were indebted, amounting to between \$2,000 and \$3,000, and that Jordan was to have the residue of the estate to pay off its debts and to distribute among the legatees under the will.

Jordan, on the other hand, claimed that the contract he made was for his own benefit exclusively, and that he, individually, was to have and retain all the residue of the estate remaining after the share of Bone and wife was taken out and the debts of the testator were paid. This would leave in his hands a residuum of about \$60,000.

In the view I take of this branch of the case, it is unnecessary to pass upon this disputed question of fact. Taking Jordan's own version of the contract between himself and Bone and wife, can such a contract be sustained?

Fleming J. McCartney, the testator, reposing confidence in the fidelity and integrity of Jordan, had made him one of the executors of his will, to take the title to and distribute his estate among the legatees under his will. While holding this trust his title as executor was attacked by a stranger to the will. Pending this attack, and while the suit was undetermined, Jordan, according to his own showing, entered into an understanding with the party assailing his title, by which it was agreed that if the title were declared void, they would divide the property of the testator between them, Jordan taking the lion's share, to the exclusion of all the beneficiaries under the will. Now, if Jordan made this con-

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tract, he was guilty of a most flagrant betrayal of his trust. His contract was in violation of the clearest dictates of public policy.

“No party can be permitted to purchase an interest in property and hold it for his own benefit, when he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use:” *Van Eps v. Van Eps*, 9 Paige, 237; *Hawley v. Cramer*, 4 Cow., 717.

Much less can an executor whose duty it is to defend his title to the trust property, make a contract with the party assailing the title, by which, in case the assault prevails, the property of the estate is to be divided between them.

When such a contract is made and carried into execution, the executor will be declared a trustee for the legatees under the will.

“Where trust and confidence are reposed by one party in another, and such other accepts the confidence and trust, equity will convert him into a trustee, whenever it is necessary to protect the interest of the confiding and do justice between them:” *Tiffany and Bullard on Trusts*, 481.

It is a rule in equity, of universal application, that no person can be permitted to purchase an interest in property, where he has a duty to perform which is inconsistent with the character of purchaser. The rule is applicable to all classes of persons standing in fiduciary relations, or relations of confidence. As stated by the Supreme Court of the United States, in *Michoud v. Girod*, 4 How., 503, “the general rule stands upon our great moral obligation, to refrain from placing ourselves in relations which, ordinarily, excite a conflict between self-interest and integrity.”

And, if an agent employed to purchase for another, purchases for himself, he will be considered trustee of his employer: *Story's Eq. Jur.*, 316.

So, if an agent discover a defect in the title of his principal to land, he cannot misuse the discovery to acquire the title for himself; if he do, he will be held a trustee for his principal: *Ringo v. Binns*, 10 Pet., 269.

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So, also, where an individual is employed as an agent to purchase up a debt of his employer; he is bound to purchase it at as low a rate as possible; if, therefore he purchase it upon his own account, he will be deemed as acting for his principal, and will be entitled to no more than he paid for it: *Reed v. Norris*, 2 Mylne & Craig, 361, 374; *Hitchcock v. Watson*, 18 Ill., 289; *Moore v. Moore*, 5 N. Y., 256.

Where a trustee, after the acceptance of the trust, causes a sale of part of the trust property under execution, for his own benefit, and becomes himself the purchaser, he will be considered as having purchased in his character of trustee for the benefit of those concerned in the trust: *Harrison v. Mock*, 10 Ala., 185.

Where an executor has, under a decree of foreclosure of a mortgage due to the estate, purchased the premises, he holds in trust; if he sells the premises at a large advance, such excess will belong to those for whose benefit the mortgage was held: *Martin v. Branch Bank*, 31 Ala., 115.

It is impossible to enumerate all the cases where the law raises an implied trust between parties standing in a confidential relation to each other. The law is very astute in discovering such relation, and exact in requiring fidelity to it. Reasoning from the foregoing authorities, can a clearer case for the application of the doctrine of implied trusts be found than the case under consideration? I think not.

So, whether Jordan made the understanding with Bone and wife, for the benefit of all the legatees under the will of McCartney, as they claim, or for his own exclusive benefit, as he claims, is immaterial. In either case, he is a trustee for the benefit of the legatees under the will.

There has been no such acquiescence in his claim by the legatees as estops them from settling up the trust, for the evidence show a decree in their favor against Jordan, rendered by the state chancery court, establishing the trust.

If Jordan held the lands conveyed to Moore in trust for the legatees under the will of McCartney, as it seems to me clear he did, his wife had no contingent right of dower therein. And the only consideration for the conveyance

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made to her by her husband on September 29, 1866, was her inchoate right of dower in other lands, the fee of which sold for \$2,225. Under the most favorable circumstances for the doweress, the present value of dower in these lands, according to the rule laid down by the Code of Alabama, would only be \$370. When it is remembered that in this case the husband was living, and his wife was fifty-seven years of age at the date of her release of dower, the value of that release shrinks to an almost inappreciable sum.

I am therefore led to the conclusion that Jordan, being hopelessly insolvent, and knowing it, and his wife knowing it, his conveyance to her of property valued at from \$8,000 to \$12,000 for so grossly inadequate a consideration, establishes, conclusively, the fraudulent character of the transaction, and that the conveyance is null and void. This conclusion is strengthened by the fact that, on the same day, Jordan made a conveyance to a near relative of substantially all his remaining property and effects.

It only remains to consider whether the conveyance of the personal property included in the deed from Jordan to Moore was fraudulent and void.

After a patient consideration of the evidence upon this point, I am not satisfied that the fraud in this conveyance has been made out. The consideration was certainly ample. By the conveyance of a tract of land to which he had no title, either legal or equitable, and a small lot of personal property worth \$1,500 or \$2,000, Jordan pays off bills of exchange of which he was the drawer, amounting to \$28,000, and for which his vendee had paid \$4,500 in money. The title of Jordan to the land must have been considered doubtful, for he had twice offered it in payment of the bills, and his offer had been declined. By the purchase of the land, Moore became the creditor of Jordan to the amount of \$28,000, and Jordan had the right, in September, 1866, to make the conveyance to him in payment of the debt, even though such conveyance resulted in a preference of Moore to the exclusion of all other creditors.

It is true there are some circumstances of suspicion sur-

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rounding the conveyance, which I will not notice; suffice it to say, that they do not establish satisfactorily the fraud of the conveyance.

There must be a decree dismissing the bill as to Moore, and declaring the deed of Jordan to his wife to be fraudulent and void, and directing the property to be turned over to the complainant as assets of the bankrupt estate of Jordan, and to be administered accordingly.

OCTOBER TERM, 1878.

LIZZIE COPELAND, ADMINISTRATRIX, v. THE MEMPHIS & CHARLESTON RAILROAD COMPANY.

1. Several states may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into one; and one state may, without thereby creating a new corporation, authorize a corporation of another state to carry on business within its territory.
2. A suit against a corporation was removed from a state to the federal court, on the ground that there was in it a controversy between citizens of different states, the plaintiff being a citizen of the state where the suit was brought. On a motion made by the plaintiff to remand the suit, because both parties were citizens of the same state: *Held*, that the burden of proof was on the corporation to show that it was not a citizen of the same state with the plaintiff.
3. The preamble of a statute is no more than a guide to the intention of the law-maker, and may be resorted to in the construction of the enacting clause, where any controversy exists as to its meaning.
4. The title of an act has generally but little weight in its construction, but in doubtful cases may be resorted to to explain the general purport of the act.
5. It is incumbent on suitors who invoke the jurisdiction of the courts of the United States to bring themselves clearly within that jurisdiction.
6. The act of the legislature of Alabama, approved January 7, 1850, entitled "An act to incorporate the Memphis & Charleston railroad company," makes said company, within the state of Alabama, an Alabama corporation.

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Heard on motion of plaintiffs to remand the cause to the state court.

On March 28, 1877, the plaintiff, a citizen of Alabama, brought her action against the defendant in the circuit court of the state of Alabama, in and for Lawrence county, to recover damages sustained by the death of her intestate, which she alleged was caused by the carelessness and negligence of the defendant.

The cause was, on the petition of the defendant, removed to this court, by virtue of the provisions of the act of March 3, 1875 (18 Stat., 470), and the record brought here by writ of *certiorari*, dated October 2, 1877. At the first term of the court following the filing of the record, the plaintiff moved to remand the cause to the state court in which it was commenced, on the ground that this court was without jurisdiction to entertain the cause. The alleged want of jurisdiction was based on the claim of plaintiff, that the defendant corporation was, for all the purposes of this suit, a body corporate, created by the laws of Alabama, and therefore a citizen of Alabama, and was not, as claimed by defendant in its petition for removal, a foreign corporation.

The question was, therefore, presented, whether the Memphis & Charleston railroad company was or was not an Alabama corporation.

The facts upon which the case turned were as follows:

On February 2, 1846, the legislature of Tennessee passed an act "To incorporate the Memphis and Charleston railroad company." The act declared that, for the purpose of establishing a communication by railroad between Memphis, Tennessee, and Charleston, South Carolina, the formation of a company was thereby authorized, which, when formed, should be a body corporate, by the name and style of the "Memphis & Charleston railroad company." The usual powers of such a corporation were conferred by the act on the body corporate thereby created.

The act named a large number of persons to receive subscriptions of stock, and appointed eight persons to act as a board of commissioners or corporators.

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Under this act books were opened for the subscription of stock, and subscriptions of stock were made.

On the 7th of January, 1850, an act was passed by the legislature of Alabama, entitled "An act to incorporate the Memphis & Charleston railroad company," of which the following is a copy :

"Whereas, an act was passed by the state of Tennessee, bearing date the 2d of February, 1846, and the same was amended by an act of the same state, dated February 4, 1848, for the formation of a company under the name and style of the "Memphis & Charleston railroad company," for the purpose of establishing a communication by railroad between Memphis, Tennessee, and Charleston, South Carolina; and, whereas, it is believed that the most eligible route for said road is through a portion of this state; and, whereas, it is also believed that great and lasting benefits will accrue to the inhabitants of this state from said improvement; therefore,

"Section 1. Be it enacted by the senate and house of representatives of the state of Alabama, in general assembly convened: That the said company shall have the right of way, through the territory of this state, to construct their road along the valley of the Tennessee river to the town of Huntsville, and thence to some point on the Nashville & Chattanooga railroad, or to some point on the Georgia or other railroad leading eastwardly, so as to communicate with Charleston and other Atlantic ports; and that said company shall have the right of way over the bed or bank of the Muscle Shoals canal, provided it can be found necessary in the construction of said road, and shall also have the right of way through any lands belonging to the state of Alabama, or to the Bank of the State of Alabama, or to any of the branch banks of said state, together with the right to use any stone, timber or other materials on said lands, necessary in the construction of said road; and said company shall have and enjoy all the rights, powers and privileges granted to them by the acts of incorporation above mentioned, and

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shall be subject to all the liabilities and restrictions imposed by the same, together with the following requirements:

“Sec. 2. That in the event said road shall be located through Tuscumbia, it shall be the duty of the company to construct a branch to Florence; and in the event that said road should pass on the north side of the Tennessee river, near Florence, it shall be the duty of said company to construct a branch to Tuscumbia, provided that the subscription in the town or county applying for such branch shall be fully sufficient to pay the costs of the same.

“Sec. 3. That said company shall be authorized and required to open books for the subscription of stock in the capital stock of said corporation, in the state of Alabama, so as to afford the citizens thereof an opportunity to take stock to the amount of fifteen hundred thousand dollars of the capital of said company; provided, that if said fifteen hundred thousand dollars be not subscribed in Alabama within ninety days after the books are open, then it may be taken elsewhere.

“Sec. 4. That the said company shall, at the first meeting of stockholders, designate a time when, and a place or places where, for the convenience of the citizens of the state who may be stockholders, the subsequent elections for directors shall be held, and give notice thereof in one or more newspapers published in north Alabama, and said elections shall be held at the same time, both in this state and in Tennessee.

“Sec. 5. That the moneys subscribed by the citizens of Alabama, whether by the state, counties, corporations or individuals, shall first be applied to the construction of the road within the limits of the state of Alabama, and said moneys shall be placed in some safe depository in north Alabama until required for use; provided, that nothing in this section shall be so construed as to prevent the company from putting under contract the whole road whenever, in their estimation, a sufficient amount of funds shall have been obtained.

“Sec. 6. That said company shall not charge for the transportation of persons or property any higher rates on one part than on another of said road, but the toll shall be equal and

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uniform on every part of said road for articles of the same description, whether passing in one direction or the other.

“Sec. 7. That the company hereby incorporated shall not locate their road on the track of the Tennessee Valley railroad, nor of any other railroad which has heretofore been chartered by this state, provided companies have been organized under the same, without first procuring the assent by agreement with said companies, but it shall be lawful for the company hereby incorporated to acquire by purchase, gift, release or otherwise, from any other company, all the rights, privileges and immunities of said company and persons, and enjoy the same as fully as they were or could be possessed or enjoyed by the company making the transfer.

“Sec. 8. That any railroad company now chartered, or hereafter to be chartered, in this state, shall have the right to connect their road with the road authorized by this act.

“Sec. 9. That nothing in this act contained shall prevent the state of Alabama from levying and collecting such taxes on the property of said company, within this state, as shall be, by the general assembly of the state, assessed on the property of other railroads in this state, nor shall anything therein be construed so as to prevent the chartering and building of other railroads in this state, coming within any distance whatever of said road, anything in the said law of Tennessee to the contrary notwithstanding.”

At a subsequent day of the same session, to wit, on February 12, 1850, the legislature of Alabama passed an act to amend the said act of January 7, 1850. The first section of this amendatory act provided as follows: “That the subscribers to the capital stock of the the Memphis & Charleston railroad company, in the state of Alabama, from a failure to obtain the necessary legislation from the states of Tennessee and Mississippi, or from any other cause, deem it expedient to form a separate and independent organization, then, and in that event, they are hereby vested with full power and authority to do the same, and said company so organized shall be known by the name and style of the Mississippi & Atlantic railroad company, and shall have and enjoy all the rights,

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privileges and powers heretofore granted, imposed, or intended to be imposed, in the several acts incorporating the Memphis & Charleston railroad company."

The second section of this act, in order to perfect the organization authorized by the first section, named certain persons to act as corporators, with all the powers of the corporation named in the original act.

The third section provided for a consolidation of the company authorized by the amendatory act with any company or companies which had been, or might be formed, under the authority of either the legislature of Tennessee or Mississippi.

Under the provisions of the above mentioned act of the legislature of Tennessee, to incorporate the Memphis & Charleston railroad company, and of the said first mentioned act of the legislature of Alabama, bearing the same title, the stockholders of the Memphis & Charleston railroad company met in Tuscumbia, Alabama, on April 29, 1850, and proceeded to the election of nine directors of the company, and on May 1, 1850, the said directors organized by the election of a president, treasurer and other officers.

Afterwards, on January 15, 1851, at a meeting of the board of directors, held on that day in Huntsville, Alabama, it was resolved that the branch from Tuscumbia to Florence be located and constructed upon the terms and conditions of the charter.

The Memphis & Charleston railroad company has but one president and board of directors, and but one set of corporate officers, and never had but one. The offices of the president, superintendent and treasurer are all located in Memphis, Tennessee, and the chief officers in all branches of the business of the company have always kept their offices there.

The stock of the Memphis & Charleston railroad company represented and covered all the property of the company, including its line of road from Memphis, Tennessee, its western terminus, to Stevenson, Alabama, its eastern terminus.

Messrs. D. P. Lewis and J. B. Moore, for the motion to remand.

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Messrs. Wm. Cooper, Milton Humes, W. Y. C. Humes and George S. Gordon, contra.

WOODS, Circuit Judge. The contention of counsel who move to remand is, that the act of the legislature of Alabama of January 7, 1850, entitled "An act to incorporate the Memphis & Charleston railroad company, created a body corporate, separate and distinct from the corporation of the same name created by the legislature of Tennessee, February 2, 1846, and that such body corporate was, of course, a citizen of the state of Alabama, by which it was created.

On the other side, it is claimed that the purpose and effect of the legislation of Alabama was, either simply to confer new powers and privileges, within the state of Alabama, on a Tennessee corporation; in other words, that the act of January 7, 1850, was merely an enabling act, or that it was to confer a charter on the Tennessee company without creating a new corporation.

There is no principle of public law which prohibits a state from authorizing a foreign corporation to extend a railroad into its own territory, and for that purpose to buy or take land, and after its construction, to maintain and use its road. The corporation still remains one corporation—a domestic corporation, in the state which created, and a foreign corporation in the other, enjoying the franchises conferred by the charter in the one, and the powers derived from the enabling act in the other. There is certainly no reason for treating it as two corporations: *Railroad Company v. Harris*, 12 Wall., 65.

The question is not so simple when two states, by common legislation, create the same corporation. In such a case, it is not merely the corporation of one state, with enlarged powers derived from the other, but it is as much the corporation of one state as of the other, and is a citizen of both. If, however, the legislatures of both states were to make one corporation only, there is no legal or constitutional necessity for treating it as two corporations in any suits or proceedings by or against it.

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It was, at one time, held by the Supreme Court of the United States, that a railroad corporation created by the legislature of two states, with the same capacities and powers, and for the same objects, and referred to in the laws of the states as one corporate body, although composed of the same persons and represented by one name, was nevertheless, on a legal and constitutional necessity, two distinct and separate corporations, upon the ground that the corporation was the creation of the sovereignty which brought it into being, and could have no legal existence beyond its jurisdiction: *Ohio & Mississippi Railroad Co. v. Wheeler*, 1 Black, 286.

This, however, is no longer the holding of the Supreme Court of the United States. According to the recent and better view, as it seems to me, of that court, the question, whether there is a unity in the corporation, and in the proprietorship of the corporate property, is one of legislative intent, and not of legislative power. Several states may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one. One state may make a corporation of another state, as then organized and conducted, a corporation of its own, as to any property within its territorial jurisdiction. A state may, by an enabling act, authorize a corporation created in another state to build and use a railroad within its own limits without creating a new corporation: *Railroad Co. v. Harris*, *supra*. See, also, *Bishop v. Brainerd*, 28 Conn., 289; *County of Allegheny v. Cleveland & Pittsburg Railroad Co.*, 51 Penn. St., 228.

The question to be decided, therefore, is resolved into this: Did the legislature of Alabama, by the act of January 7, 1850, intend to create a new corporate body to be known as the Memphis & Charleston railroad company, to be a corporation and citizen of Alabama, or merely to recognize the existence of a Tennessee corporation of the same name, and confer upon it the certain powers and privileges, and subject it to certain conditions and restrictions in the state of Alabama.

I have had much difficulty in arriving at the object of the

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legislature in the passage of this act. I have, however, finally reached a conclusion, satisfactory to my own mind, that the design of the law was to create a body corporate in the state of Alabama, having the same powers and franchises as the Memphis & Charleston railroad company, incorporated by the legislature of Tennessee.

The burden of proof is upon the defendant, to show that the Memphis & Charleston railroad company, defendant in this case, is not a citizen of the state of Alabama, but a citizen of Tennessee. The defendant, on this hearing, affirms the jurisdiction of this court, and the plaintiff denies it.

In a suit brought by or against a corporation, it is necessary that it be made to appear that the artificial being was brought into existence by the law of some state other than that of which the adverse party is a citizen: *Muller v. Dows*, 94 U. S., 444.

The facts necessary to jurisdiction of the courts of the United States, must be affirmatively averred, and if denied, proved. The defendant must, on this hearing, satisfy the court of its jurisdiction, and this can be done only by showing that the corporate body sued in this case is not a citizen of the state of Alabama. If this proposition is not made reasonably clear, the court ought not to take jurisdiction, but the motion to remand the cause to the state court should prevail.

The controversy turns, mainly, on the construction of the act of January 7, 1850, to incorporate the Memphis & Charleston railroad company.

The proper construction of a statute requires an examination of the body of the act, the preamble, where there is one, and in certain cases, and for certain purposes, the title may be considered.

The true meaning of a statute is generally to be sought in the purview, enacting part, or body of the act: *Sedgwick on Construction*, 45.

It is an established rule in the exposition of statutes, that the intention of the law-giver is to be deduced from a view of the whole and of every part of the statute, taken and

compared together: 1 Kent's Com., 462; Dwarris on Statutes, 194.

The preamble to a statute usually contains the motives and inducements to the making of it, but it has been held to be no part of it, or rather it is not an essential part, and is frequently omitted.

The preamble is properly referred to when doubts and ambiguities arise upon the words of the enacting part. The preamble can never enlarge it, can not confer any powers *per se*. Its true office is to expound powers conferred, not substantially to create them.

A preamble is not only not essential, and is often omitted, but it is, strictly speaking, without force in a legislative sense, being but a guide to and not the intent of the statute. And to what is it properly a guide? To the meaning of the enactment? No, but the intentions of the framer, which is only the first stage on the road in the construction of statutes: Dwarris on Statutes, 107, citing *The King v. Athos*, 8 Mod., 144; *Mills v. Wilkins*, 6 Mod., 62; Story's Com. Rules of Interpretation of the Constitution.

The preamble of an act may be resorted to to aid in the construction of the enacting clause when any ambiguity exists: *Beard v. Rowan*, 9 Pet., 301.

The use of a title in expounding a statute is shown by the following citations:

By the English decisions, the title of a statute has been frequently held to be no part of a statute, for it has usually been framed only by the clerk of the house in which the bill first passes, and is seldom read more than once. In *Mills v. Wilkins* (6 Mod., 62), Chief Justice Holt said: "It is true, that the title of an act of parliament is no part of the law or enacting part, no more than the title of a book is a part of a book, for the title is not the law, but the name or description given to it by the makers. Being, then, no part of the act, the title is seen to afford no legislative import: Dwarris, 103." But even in England this rule has been modified, and it now seems that when the meaning of the body of the act is doubtful, the title may be relied on as an

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assumption in arriving at a conclusion: *King v. Cartright*, 4 T. R., 490.

The title is worthy of more consideration, in the case of American statutes, when the legislature passes on the whole statute title, preamble, if any, and the body of the statute. In many American legislatures the title of the act is agreed to by a distinct vote of the body.

But even in this country, though the title of an act cannot control plain words in the body of the statute, yet, taken with other parts, it may assist in removing ambiguities. Where the intent is plain nothing is left to construction, but when the mind labors to discover the design of the law-making power, everything which can aid this object may be resorted to, and even the title of the act may receive a due share of consideration: *United States v. Fisher*, 2 Cranch, 358; *United States v. Palmer*, 3 Wheat., 610; *Commonwealth, ex rel., v. Slifer*, 53 Penn. St., 71.

In doubtful cases the title of an act may serve to explain the general purport, but even then it has little weight: *Hadden v. The Collector*, 5 Wall., 107.

In the light of these principles the act of January 7, 1850, is to be construed and its meaning ascertained. The question to be decided is, is the act a mere enabling act to confer certain powers on a Tennessee corporation within the state of Alabama, or did it create a new body corporate, having the same franchises as the Tennessee corporation, but still being a distinct and separate artificial person.

In resolving this question the preamble affords no assistance, for it is just as applicable to one theory as the other. It refers to the act of Tennessee, incorporating a company for the purpose of establishing a communication between Memphis and Charleston, recites that the most eligible route for said road is believed to be through a portion of this state, and that great and lasting benefits will accrue to the inhabitants of this state from said improvement.

These are the reasons given by the preamble which induced the passage of the act. These reasons are just as strong for the passage of an act to create a new Alabama

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corporation to assist in the enterprise, as for the passage of an enabling act for the benefit of a Tennessee corporation.

The end in view, namely, the establishing of a railroad communication between Memphis and Charleston, and the consequent benefits to the inhabitants of Alabama, could be just as well secured by one enactment as the other. We derive no light from the preamble, and must, therefore, look first to the body of the act to ascertain its meaning.

The first section of the act, standing alone, gives strong warrant to the idea that the act is only an enabling act.

If the act consisted of the first section only, and its title were "An act to confirm an act passed by the legislature of Tennessee to incorporate the Memphis & Charleston railroad company," the controversy would fall directly under the authority of the case of the *Railroad Company v. Harris*, 12 Wall., 65, where it was held that such a law did not create a new corporation, but granted permission to a corporation of another state to exercise its functions within the boundaries of the state by which the act was passed.

The conclusion of the Supreme Court in that case, in the construction of the law of Virginia, was reached only after re-argument, and after much difference of opinion upon the question, whether the law of Virginia created a new and distinct corporation, or was only an enabling act in respect to the corporation known as the Baltimore & Ohio railroad company, as originally created by Maryland.

And it is worthy of remark, that the same enactment of the Virginia legislature had been construed by the Supreme Court of that state as creating a Virginia corporation—a new and distinct corporate body.

The case of *Williams v. Missouri, Kansas & Texas Railway Company*, 3 Dillon, 267, would also be an authority to support the view of the defendant, if the Alabama act consisted of the first section, only with the title changed as above suggested.

But, the act under consideration does not stop with the first section; several sections are added. It is, to my mind, very significant, that in the first section the company is called

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“the said company.” The section begins, “that said company shall be authorized and required to open books,” etc. The fourth section declares “that said company shall, at the first meeting of stockholders,” etc.; and throughout this act, until we reach the seventh section, the company is referred to as “the said company.” But, in the seventh section, however, this phrase is abandoned, as if designedly, and the company is twice designated as “the company hereby incorporated.” Why this change? It was more natural to continue the use of the phrase, “the said company,” which had been employed seven times in the preceding sections of the act. But the legislature, with the apparent design of giving a construction to what had been done by the first section, declares, in the seventh, that “the company hereby incorporated shall not locate their road,” etc.; “and it shall be lawful for the company hereby incorporated to acquire by purchase,” etc.

These words, used under these circumstances, mean something. They ought to have effect if possible. We are not authorized to reject them. They are not inconsistent with the first section. They are only explanatory of it. They are a declaration by the legislature, that the effect of the act was to incorporate a company. They remove the doubt which, for a long time, troubled the Supreme Court of the United States in construing the Virginia act in the case of the *Railroad Company v. Harris, supra*.

The question might be left here, but considering that the true meaning of the act is still open to some doubt, the case has arisen for resort to the title—and a case in which the title ought to have more than ordinary weight. There is no dispute as to the purpose which the legislature had in view, for that is indicated by the preamble; it was to aid in establishing communication between Memphis and Charleston by a railroad passing over a portion of the territory of Alabama, and it was to afford that aid by an act either creating an Alabama railroad corporation, or by an act conferring upon a Tennessee railroad corporation franchises to be enjoyed within the territory of Alabama. The only question is, which of these

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two things was done by the act under consideration. The title is explicit, and so far as it deserves consideration, its weight is altogether in favor of the hypothesis that a new body corporate was created. It declares the purpose of the act to be "to incorporate the Memphis & Charleston railroad company." There is no ambiguity here. To incorporate means "to form into a legal body, or body politic—to constitute into a corporation recognized by law as persons with special functions, rights and duties, as to incorporate a bank, a railroad company, or the like : " Webster's Dictionary.

This seems to remove the doubt, if any existed. The title declares the purpose of the the act to be to incorporate a certain railroad company, and the seventh section declares that by the act such a company was incorporated.

But conceding that, after giving the title all the weight it deserves, the true construction of the act is still in doubt, nevertheless, it may be finally claimed that the doubt is of such strength as to preclude the jurisdiction of the courts of the United States. It is the duty of suitors who invoke that jurisdiction, to bring themselves clearly within it, as we have already seen. I am of opinion, therefore, that the defendant has not met the requirements of the law by showing that this court has jurisdiction of the case.

It was urged, in the argument, that the requirements of the fourth section are inconsistent with the view here taken. The requirement referred to is, that "the said company shall designate a time and place in north Alabama where, for the convenience of Alabama stockholders, elections of directors shall be held, etc. It is urged that it would be absurd for the law to require the directors of a Tennessee corporation to fix the time and place for the election of the directors of an Alabama corporation.

The obvious answer to this is, that it was the plain intent of the law that while there was to be two corporate bodies of the same name—one in Tennessee and one in Alabama—yet they were to have the same board of directors and the same officers, in a word, the same organization. That this could be done, is held in the case of the *Ohio & Mississippi Rail*

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road Company v. Wheeler, 1 Black, *supra*. If the two corporations were to be governed by the same board of directors, there was great propriety in the enactment that the Alabama stockholders should have notice of the time and place fixed for their election, and that a poll for the election of directors should be opened in north Alabama.

The act of February 12, 1850, to amend the above recited act to incorporate the Memphis & Charleston railroad company, is not inconsistent with the view above taken. As it was the purpose of the original act that both the Tennessee and Alabama corporations should have but one organization and board of officers, the amendatory act provided that in a certain contingency the subscribers to the capital stock of the Memphis & Charleston railroad company, in Alabama, might, if they deemed it expedient, form a separate and independent organization. In other words, that being already a body corporate, they might withdraw from their connection with the Memphis & Charleston railroad company of Tennessee, and take a new name, and for this purpose commissioners, or corporators, were named, and were authorized to change the western terminus of their road. In fact, this amendatory act seems entirely inconsistent with the theory that there was no Alabama corporation known as the Memphis & Charleston railroad company.

The subsequent legislation of the state, although not decisive, seems to proceed on the idea that it is dealing with a domestic corporation.

In an act approved February 7, 1856, the act of January 7, 1850, is referred to as the "charter granted to said company by the general assembly of this state," and four different acts have been passed by the legislature of Alabama to authorize the Memphis & Charleston railroad company to borrow money and secure its payment by mortgage on its road, without any hint that this power was conferred on a foreign corporation.

In the case of the *Memphis & Charleston Railroad Company v. Bibb*, 37 Ala., 699, the said company is designated as a corporation chartered by an act of the legislature of this

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state. This is, to be sure, merely *obiturn dictum*, but it tends to show how the railroad company has been regarded by the highest judicial tribunal of the state.

But it is claimed by counsel for the railroad company, that even admitting that the act of January 7, 1850, was a charter, yet it was a charter conferred on a corporation of the state of Tennessee, without creating a new corporate body.

It is true, that two states may unite in creating one and the same corporate body, and it was so held in the *Railroad Co. v. Harris, supra*. But when two states unite to create the same body corporate, it is a citizen in each of the states by whose legislature it is created; *Railroad Co. v. Whittton*, 13 Wall., 270; *Ohio & Mississippi Railroad Co. v. Wheeler*, 1 Black., 286.

After an attentive consideration of the arguments of counsel, and on examination of the authorities cited by them, I am of opinion that the act of January 7, 1850, of the general assembly of this state, created the Memphis & Charleston railroad company as an Alabama corporation. The consequence of this view is, that this court has not jurisdiction of this case, and that the motion to remand it to the state court from which it was removed must prevail.

NORTHERN DISTRICT OF FLORIDA.

PENSACOLA, MARCH TERM, 1879.

W. WESTHOFF v. THE BARK OLUF.

A tow which is itself without fault is not liable for damages resulting from a collision caused by the fault of the tug.

ADMIRALTY APPEAL.

Messrs. J. P. Jones and S. R. Mallory, for libelant, cited: 1 Parsons on Maritime Law, 208 and note; *The Gray Eagle*, 9 Wall., 505; *The Granite State*, 3 Wall., 310; *Strout v. Foster*, 1 How., 89; *The Express*, Olcott, 258; *The Maria Martin*, 12 Wall., 31; *The Tug Brothers*, 2 Biss., 104; *The Scioto*, 2 Ware (Dav.), 359; *The B. S. Shepherd*, 1 Biss., 221; *The Palmetto*, *idem*, 140.

Mr. G. R. Stanley, for claimant, cited: *The Express*, 1 Blatch., 365; *Owners of the James Gray v. Owners of the John Fraser*, 21 How., 184; *Sturgis v. Boyer*, 24 How., 110; 1 Parsons on Shipping and Admiralty, 434.

WOODS, Circuit Judge. The libel was filed to recover damages sustained by the schooner Zenobia, of which the libelant was master, resulting from a collision between her and the bark Oluf.

The facts were as follows: About five o'clock on the morning of January 1, 1876, the Oluf, in tow of the steam tug Seminole, approached the harbor of Pensacola, where, about one-quarter of a mile from the wharf, and in the usual and proper place, the Zenobia was lying at anchor. The

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Oluf was towed astern of the tug by a hawser between forty and fifty fathoms long.

The tug passed the Zenobia without collision, but the Oluf ran into the Zenobia, causing damage to the amount of about \$325.

The libelant claims that the Zenobia, being at anchor, it was the duty of the Oluf, on entering her harbor, to take every reasonable precaution to avoid a collision; that instead of doing this the Oluf was managed without skill, that she had but one lookout, and she was towed into the harbor at too high a rate of speed, namely, seven or eight knots an hour.

The answer of the respondent claims that the Oluf was skillfully managed, that she had a proper lookout, and that the collision was caused by the rate of speed at which she was towed, and the want of the light upon the Zenobia required by the sailing regulations for vessels at anchor.

The evidence satisfactorily establishes that the Oluf was towed into the harbor by the Seminole, at the rate of seven or eight knots an hour, and that the Zenobia, at the time of the collision, did not have up her lights, and that the collision was the result of these two causes combined. The evidence does not, in my judgment, show any neglect or want of skill on the part of the Oluf. She had the proper lights, sufficient lookouts, and, as directed by the master of the Seminole, kept astern of the tug. She was directly astern just preceding the collision.

As there was no light on the Zenobia, and as the Oluf was being towed at the rate of seven or eight knots an hour, she did not discover the Zenobia in time to change her course so as to avoid the collision.

The Oluf not being herself in fault, the question is, is she liable for the damage resulting from the fault of the tug of which she was in tow.

If she is, then both parties being in fault, the one for recklessness in coming into the harbor at such a high rate of speed, and the other for not having her lights set, the damage must be equally divided. If the Oluf is not liable for

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the fault of the tug, the libelant should have proceeded against the tug, and the libel against the Oluf must be dismissed.

The authorities upon the question, whether the tug or the tow is liable for the damages resulting from a collision, are very conflicting. See Parsons on Maritime Law, 208, note.

The true rule on this question is laid down by the Supreme Court of the United States, in *The Maria Martin*, 12 Wall., 31.

“Cases undoubtedly arise,” says Mr. Justice Clifford, in that case, “where both the tug and tow are jointly liable for the consequences of a collision, as where those in charge of the respective vessels jointly participate in their control and management, and the master and crew of each vessel are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Where the officers and crew of the tow, as well as the officers and crew of the tug, participate in the navigation of the vessels, and a collision with another vessel ensues, the tug alone, or the tow alone, or both jointly, may be liable for the consequences according to the circumstances, as the one or the other, or both jointly, were deficient in skill, or were culpably inattentive or negligent in the performance of their duties.”

To apply this rule to this case, it seems to me that no fault can be found with the management of the Oluf. She had out her lights, green and red, properly set, was fully manned, had a competent and sufficient lookout, and followed implicitly the directions and signals of the tug. The collision was the result of no neglect, unskillfulness or misconduct of her officers and crew. It was caused in part by the high rate of speed of the tug, and in part by the want of a light on the Zenobia.

To hold the Oluf responsible, under the circumstances of the case, would not, it seems to me, be in accordance with the rule laid down by the Supreme Court. My opinion is, therefore, that the libel ought to be dismissed at libelant's costs.

Bodin v. The Thule.

L. BODIN ET AL. V. THE THULE.

It is no defense to a libel to recover damages resulting from a collision to say that it was caused by the *vis major*, namely, a hurricane, if the collision could have been avoided by foresight, precaution and nautical skill.

ADMIRALTY APPEAL.

Mr. E. A. Perry, for libellant, cited: *The Louisiana*, 3 Wall., 164; *The Merrimac*, 14 Wall., 199.

Messrs. R. I. Campbell and G. A. Stanley, for claimants, cited: *The Morning Light*, 2 Wall., 550; *The Great Republic*, 23 Wall., 20; *Owners of the James Gray v. Owners of the John Fraser*, 21 How., 184.

Woods, Circuit Judge. The libel claims a decree for the damages sustained by the bark Marie, of which the libellants were owners, in consequence of a collision between her and the bark Thule, which happened about three o'clock on the morning of January 24, 1875. The facts were these: On January 19 preceding, the Thule had been moored alongside and near the end of the railroad wharf, in the bay of Pensacola, with her bow pointing to the shore, and the Marie had been moored to the same side of the wharf, bow towards land and her stern distant only about six feet from the bobstays of the Thule.

About three o'clock A. M., January 24, a violent squall suddenly came on, as the result of which both barks were forced from their moorings and driven ashore, and considerable damage sustained by the Marie.

The claim of the libel is that the Thule was moored in a careless, negligent and insecure manner; that in consequence thereof she parted her moorings and drifted against the Marie, and caused her to break her mooring chains and drift from the wharf and to go ashore; and that the Marie suffered damage by the collision with the Thule, by being driven on shore, and by the delay caused by the said collision.

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The answer denies that the Thule was negligently or insecurely moored, denies that the Thule collided with the Marie, whereby the latter was forced from her moorings, and avers that both barks were driven from their respective berths by the squall, and that the Marie was driven from her moorings and out of her berth, and had grounded before she was struck by the Thule.

The answer further claims, that if any damage was sustained by the Marie, it was in consequence of inevitable accident and the *vis major*, against which human prudence and foresight could not provide, and, therefore, the Thule should not be compelled to respond in damages to the owners of the Marie.

The evidence in the case satisfies me that the Thule broke loose from her moorings and collided with the Marie before the Marie parted her mooring chains, and that the collision was the cause of her being driven from her berth. While there is some conflict of evidence on this point, the decided preponderance is in favor of the view just stated. The witness Robert Christy, who was sleeping in a small house on the wharf, came out of the house for fear the storm would blow it over, and standing, as he states, within fifteen feet from the bow of the Thule and the stern of the Marie, saw the relative positions of the two barks. The bow of the Thule was ten feet from the stern of the Marie at that time. He saw the Thule break her moorings, the Marie remaining hard and fast, and in about two minutes the Thule came down and struck the Marie in the stern, and caused her to carry away her moorings. The Marie, he repeats, was fast and secured by her moorings when the Thule struck her.

This witness is corroborated by Boyson, who was on watch on the deck of the Marie before and during the squall.

Zachariahson, the master of the Marie, who was on board when the squall came on, testifies that he felt the shock of a collision with the stern of his ship.

There were marks of the collision on the stern of the Thule, which, according to the evidence, could not have been caused except by the bow of the Thule, which was the only

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vessel adrift. Moreover, the witnesses are of opinion that the Marie was so securely moored that the force of the squall alone could not have carried her from her berth.

On the other hand, no witness for the defense, except the carpenter on the Thule, Winge, testifies that he saw the barks that morning until after they had both broken from their moorings. The witnesses for the defense do not, therefore, contradict the evidence for the libelant, to the effect that the Thule broke away first, and, colliding with the Marie, caused her to break from her moorings.

There is much conflict of evidence as to the moorings of the Thule. Several witnesses for the defense have testified that the Thule was securely moored. The condition in which the lines, by which the Thule was made fast to the wharf, were found after the squall, is stated by a board of survey appointed by the Norwegian consul, who reported, that the moorings consisted of one eight-inch hemp rope, made fast to a cross-tree two and one-half inches in diameter, and this was fastened between two stanchions on deck. These were both rotten. There were also two manilla ropes, both of which were in bad condition; and a four-inch hemp rope, badly worn.

Jacob Bug, one of the board of survey, testifies that the Thule was moored to the wharf with one eight-inch hemp rope, which was fastened to the vessel in the manner described by the board of survey, that the cross-tree was rotten at one end, and both stanchions were rotten, that the two manilla ropes were worn and rotten, and that the hemp rope was half worn. None of the fastenings on the wharf gave way.

One fact is clear and undisputed, that the moorings of the Thule were not sufficient to hold her fast to the wharf, in the squall of January 24, 1875.

She broke away from her moorings, and; as the weight of testimony shows, collided with the Marie, to the serious damage of the latter.

The defense claims that the damage was the result of the *vis major*, that the squall was sudden, unforeseen, and was

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unprecedented in severity, and, therefore, the collision was an inevitable accident, against which human foresight could not provide.

The collision being caused by the drifting of the Thule from her moorings, she must be liable for the damage resulting therefrom, unless she can show affirmatively that the drifting was the result of inevitable accident, or a *vis major*, which human foresight and precaution, and a proper display of nautical skill, could not have prevented: *The Louisiana*, 3 Wall., 164.

Is this shown? The condition of the moorings of the Thule shows that she was not sufficiently secured against a storm of much less violence. She had only one good and sufficient rope, and that was fastened to a decayed cross-tree set in two rotten stanchions. Her other ropes were so worn and decayed that they could not hold.

But the evidence shows that the Thule might have had warning of the coming storm. The night before the barometer indicated that a blow was imminent. The master of the Marie took warning, and although his bark was moored by two one-inch chains, procured two others of the same size, and used them to make his bark safe and fast. The master of the Thule, with the same warning, took no precautions to make more secure his moorings. He relied on what he had deemed sufficient for gales and rough weather, when his glass warned him that an extraordinary blow was coming. It seems to me, that even if it be conceded that the Thule was sufficiently secure against even strong gales and squalls, yet, that when warned that a blow, which might be a gale, or might be a hurricane, was coming, common prudence would have dictated the strengthening of his moorings.

This the Marie did, and, but for the fault of the Thule, would have weathered the squall in safety. The Thule neglected this most necessary precaution, and broke from her berth and caused the damage complained of.

The *vis major*, or act of God, is a natural and inevitable necessity, and one arising wholly above the control of human

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agencies, and which occurs independent of human action or neglect: 2 Kent's Com., 597.

I do not think the testimony brings the defense within the terms of this definition. The collision might have been avoided by prudence and foresight. It was not an inevitable necessity.

The result of these views is, that the libelants are entitled to recover the damage sustained by the Marie from the collision.

A consideration of the evidence satisfies me that the amount found by the district court is substantially correct, and I direct that a decree be entered for that sum, with interest from the date of the decree in the district court, and costs of suit in both courts.

JACKSONVILLE, AT CHAMBERS, MAY, 1877.

THE WESTERN DIVISION OF THE WESTERN NORTH CAROLINA
RAILROAD COMPANY v. GEORGE F. DREW, GOVERNOR,
AND WALTER GWYNN, TREASURER OF THE STATE OF
FLORIDA, THE FLORIDA CENTRAL RAILROAD COMPANY
ET AL.

1. The granting of a preliminary injunction is within the discretion of the court, and in the exercise of this discretion it will look at the consequences which will ensue, on the one hand, from granting it, and, on the other hand, from withholding it.
2. Upon a bill filed to restrain a sale of mortgaged property by a trustee, on the ground that the bonds to pay which the sale was to be made were void. *Held*, that the possibility that a favorable chance to sell the property would be lost by delay, was not a legal ground for refusing to restrain the sale, which would entirely destroy the rights of complainant, if he had any.
3. The real owner of the majority of stock in a railroad company who permits its affairs to be managed by others holding the legal title to the stock, and the officers elected by them, cannot claim as against innocent parties, that the company is exempted from any obligation

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which it has assumed through such officers and managers, or to which it may, through them, have become equitably liable.

4. The trustee, with power of sale, for certain parties holding bonds secured by a lien upon a railroad, has the right to decide, in the first instance, upon the sufficiency of the claim of the bondholders to have the property sold to pay the bonds which they profess to hold; at the same time, those representing the railroad company have the concurrent right of appealing to the courts for an adjudication upon the claims and rights of the alleged bondholders.
5. Where the evidence upon a motion for injunction raised grave doubts on the question, whether the bondholders in whose behalf the trustee was about to make a sale, were *bona fide* holders, an injunction to restrain the sale was allowed.

IN EQUITY. Heard upon motion for preliminary injunction. The facts sufficiently appear in the opinion of the court.

Messrs. Joseph B. Stewart and E. M. Thompson, for the motion.

Messrs. Henry R. Jackson and George P. Rainey, contra.

BRADLEY, Circuit Justice. The object of this suit, as set forth in the prayer of the bill, is to enjoin the governor of Florida from seizing the Florida Central railroad, extending from Jacksonville to Lake City, and to have declared null and void certain bonds purporting to be bonds of the Florida Central railroad company, one thousand in number, for one thousand dollars each, dated January 1, 1870, which bonds are in possession of the treasurer of the state of Florida, and for non-payment of interest on which the governor threatens to seize and sell the road. The bill further prays that the said treasurer may be decreed to surrender said bonds to the company, and that certain persons, made defendants, to wit, John Collinson and others, may be enjoined from harassing the company on account of said bonds.

The governor having advertised the road for sale, motion is now made, on petition filed for that purpose, for a preliminary injunction against him to prevent his seizing and selling the road; against the treasurer from parting with the bonds pending suit, and against the parties claiming relief on account of the bonds from further interfering with the said

railroad, or causing it to be seized, until final decree in the cause.

The motion for injunction is opposed by the defendants, the governor and treasurer of the state, on three grounds:

First. That the complainant has no title and no right to interfere in the matter.

Secondly. That if it ever had title, it has lost and waived it by *laches*, and by acts which estop it from claiming any relief.

Thirdly. That the bonds are not void, but are in equity good against the company for the benefit of persons holding certain state bonds, which they purchased in good faith, and which were issued to the company in exchange for the said company bonds, but which, being void, the said purchasers have a right to resort to the bonds in question, and the state has a right to compel their payment for this purpose.

The bill has been demurred to, and the demurrer has been overruled after argument. The question of the complainant's title, and the question of *laches*, so far as appeared on the face of the bill, were fully discussed on the demurrer, and unless the aspect of the case on these points has been changed, the decision made upon that argument must be regarded as the law of the case. The defendants not having filed answers, the case still remains as before on the pleadings. But affidavits have been read on the present motion, both on the part of the complainant and the defendants, and various records and documents, either verified or conceded to be authentic, have been referred to. So far as these may have altered the complainant's case, it is necessary to examine them.

Before doing this, however, it is proper to observe that it would be very unfair to the parties to decide the whole merits of the case on this motion upon mere affidavits. The granting of a preliminary injunction is in the discretion of the court, and in exercising this discretion it will look at the consequences which would ensue on the one hand by granting it, and on the other by withholding it. In the present case, it is apparent that if the complainant has the rights

claimed by the bill, and if the bonds are really void, or there are plausible grounds for supposing them to be so, a very serious, if not irreparable, injury would ensue by seizing and selling the road in the summary manner proposed. On the other hand, if it should turn out that the complainant's title is defective, or that the company bonds are amenable to the claims of the bondholders referred to, a temporary suspension of the sale cannot materially injure them. The property is there, and will remain there, and its earnings can, in the mean time, be employed in keeping it in repair. The possibility that a favorable opportunity of disposing of it, known to exist, may be missed by the delay, can hardly be deemed a legal ground for precipitating a sale which would most certainly destroy the rights of the complainant, if he has any. These are considerations necessary to be borne in mind in disposing of the present motion.

I am fully aware of the great importance to the people and business of the state, that the vexatious litigation respecting this and the connecting railroad should be terminated; and that the roads should come into the possession of responsible parties clothed with a secure title, in order that they might feel encouraged to improve and extend it, and make it what it should be, a first-class line of communication. But however desirable it may be that this result should be hastened, it is very questionable whether it would be hastened by disregarding those obvious principles of justice of which all parties litigating in good faith have a right to enjoy the benefit.

Looking, then, at the affidavits laid before me, I do not see that the title of the complainant has been materially affected by anything new which has been evolved. In truth, the allegations of the bill have rather been corroborated than weakened. It seems to be indisputable that Swepson and Littlefield, between them, did procure the stock of the Florida Central railroad company with the proceeds of North Carolina bonds, which they had no right to dispose of in that way; and that the complainant, as soon as the fraud was discovered, endeavored to hold them and their

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confederates accountable; and after pursuing the wrongfully converted funds through much litigation, and after many ineffectual attempts at compromise, the complainant finally procured an acknowledgment of its equitable claim to this stock, which Littlefield, who is a party to this suit, and holds the principal part of it, does not deny. The affidavits of Rollins, the president of the complainant, and of Mr. Stewart, the solicitor, are to the effect that in December last, previous to the commencement of this suit, Littlefield recognized the rights of the complainant to the stock of the Florida Central railroad company, and made a full and complete transfer thereof to the use of the complainant.

The suggestion made by defendants' counsel, that the North Carolina bonds, the proceeds of which were embezzled, were void, and were repudiated by the state, and, therefore, that the complainant had no title to call Swepson and Littlefield, and their confederates, to account, and that the parties who purchased the bonds are the real beneficiaries entitled to pursue these funds, may possibly be well founded, and may govern the rights of the parties on the final hearing of the cause on the merits. But I do not feel justified, at this stage of the cause, in assuming that the facts on which this suggestion is grounded are sufficiently made out. All the negotiations, agreements of compromise and litigations which have taken place between the complainant and the parties having possession of the bonds, have either proceeded upon a concession of the plaintiff's right, or have resulted in adjudications confirmatory of it. So far as appears by the disclosures in this cause, the complainant is the only party equitably interested in the principal part of the stock of the Florida Central railroad company.

The next question is, whether, conceding this to be so, the complainant has not, by permitting Littlefield, Swepson and their associates to appear as the owners of the stock, made them its agents and trustees so as to be bound by their acts as apparent stockholders and as directors of the company, at least so far as regards innocent parties dealing with them as such? On this question, without going

into the evidence in detail, I shall do little more than state the conclusion to which I have arrived—a conclusion based, it must be remembered, only on affidavits and the documents which have been presented on this hearing. It seems to me that the question proposed must be answered in the affirmative, to wit, that the complainant has permitted Littlefield and his associates so to deal with the property as to make their acts performed in their capacity of stockholders and officers of the Florida Central railroad company binding, except as to those persons who had notice that they were acting in any transaction in fraud of the rights of the complainant. It is sufficient, in this connection, to refer to the agreement made on the 16th day of April, 1870, between the Florida Central railroad company, George W. Swepson, president; the Jacksonville, Pensacola & Mobile railroad company, Milton S. Littlefield, president, and Littlefield, majority owner of the stock of the Tallahassee railroad company, of the first part, and the western division of the western North Carolina railroad company, represented by N. W. Woodfin and others, commissioners appointed by act of the legislature of North Carolina, approved by the stockholders of said corporation (that is, the complainant), of the second part. The agreement recites that, whereas G. W. Swepson, late president of the western division of the western North Carolina railroad company, had made certain investments of the funds of said company in securities of and interests in the said Florida Central railroad, Jacksonville, Pensacola & Mobile railroad, and the Tallahassee railroad of the state of Florida, as per report made by said Swepson to said commissioners, amounting in the aggregate to \$1,287,436.03, to bear interest from the first of November, 1869, at eight per cent per annum; and, whereas, Swepson had theretofore conveyed to Littlefield, subject to the payment of the above claim, his interest in the above railroads; and, whereas, Littlefield had received authority from the legislature of Florida and said several railroad companies, to receive bonds to be issued by and for account of the several railroad companies, which bonds were to be exchanged for the bonds of

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the state of Florida, to be issued for the purpose of aiding the finances of the said several railroad companies, all of which bonds were then in a state of preparation; and, whereas, Littlefield had made a contract with S. W. Hopkins & Co., for the disposition of said bonds, as the same might be issued, the proceeds of the issue of the bonds of the Central railroad company of Florida, amounting to \$960,000, were to be applied to the payment of existing liabilities of the several railroad companies, including \$150,000 to be paid to the commissioners aforesaid for the purpose of paying existing liabilities of the western division of the western North Carolina railroad company; it is therefore agreed by the parties that the proceeds of the sale of said bonds to be issued by the Florida railroad companies and the state of Florida, are to be equally divided between the western division aforesaid and the Florida railroads, until the entire amount of \$1,287,436.03, with interest as aforesaid, is fully paid. It is further agreed, that all the interest owned or claimed by Swepson and Littlefield, or which, as individuals, they had a right to control in the Florida railroads, is pledged for the faithful fulfillment of this contract, without the right on the part of any party to interfere with their management or control of the affairs of the roads. This agreement was signed by Swepson and Littlefield, and by the North Carolina commissioners, who assumed to act for the complainant, and had been appointed by the legislature, and, as they declare, by the complainant, so to act. As the state of North Carolina was the largest stockholder of the complainant, and as it is conceded that the affairs of the complainant—the western division—were for a long time administered by these commissioners, I must assume on this hearing that they had proper authority to represent the complainant in this transaction. At all events, the complainant company had full notice of it, and must be regarded as bound, so far as innocent third parties are concerned.

This agreement is important, not only as showing that the complainant acquiesced in the management of the affairs of the Florida railroads by Littlefield and Swepson as the appar-

ent stockholders and officers thereof, but that it acquiesced in the issue of the very bonds which are involved in this case, and in their exchange for the Florida state bonds, and in the disposal and sale of the latter. And, although subsequent agreements may have been made between the parties (as there were more than once), yet the whole subsequent conduct of the complainant with regard to the Florida railroad property was in affirmation of the authority of Swepson and Littlefield to represent the stock and affairs of the Florida companies. At all events, nothing seems to have been done by the complainant during the long period that followed to put the public on its guard against dealing with those persons as the proper and lawful stockholders and officers of these companies.

Upon the whole case, therefore, as it stands before me on affidavits, I come to the conclusion that the complainant can claim no rights except such as the Florida Central railroad company itself can claim in view of the acts of its known and apparent stockholders and officers. After permitting the affairs of the company to be managed by those stockholders and officers for so many years, it cannot claim to have the company exempted from any obligations which it has assumed, or to which it may be equitably liable. It cannot claim to stand in a better position than the corporation itself, and especially is this true in reference to *bona fide* purchasers of the Florida state bonds, issued in exchange for the bonds of the corporation. But my conclusion is, that it is entitled, as the case now stands, to represent the interests of the corporation, and to ask that its just rights may be protected.

Then, lastly, the question arises, whether the parties at whose instance and in whose behalf the governor of the state of Florida proposes to sell the Florida Central railroad are *bona fide* purchasers of the Florida state bonds, issued in exchange for the bonds of the corporation?

On this question I must confess that I am not entirely free from doubt. The papers presented to the governor were undoubtedly sufficient to authorize him to take the initiatory steps which he has done in advertising the property for sale.

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He considered them sufficient, and the law makes him the judge, at least in the first instance, of their sufficiency. Parties adversely interested, of course, have the right to a judicial investigation and determination of the question. The governor's power in the matter is analogous, though in some respects superior, to that of a mortgagee with a power of sale. Such a mortgagee is not obliged to resort to the courts, but may sell on default of payment by giving notice according to the terms of the mortgage. But any person interested adversely to such a sale, may apply to the courts and have his rights adjudicated therein.

Whilst, therefore, the governor had the right, in the first instance, to decide on the sufficiency of the proofs laid before him, the complainant, as representing the interests of the Florida Central railroad company, had the concurrent right of appealing to the courts for an adjudication upon the claims of those in whose behalf the governor assumed to act. And it seems to me that all that is requisite on the part of the railroad company is to show a probable ground of defense against those claims in order to invest the court with a jurisdiction of the controversy. It would deprive parties of the benefit of a judicial determination of their rights, and would impose upon the governor a responsibility which, I doubt not, he would be very unwilling to assume, if the court, on the presentation of such a case, should decline to assume jurisdiction of the controversy.

Whilst it must be assumed, therefore, and whilst, on examination, there appears no doubt that the proofs laid before the governor were *prima facie* sufficient to justify the proceedings undertaken by him, the facts which have now been disclosed by the complainant are calculated to raise grave doubts whether the parties claiming to be purchasers of the state bonds in question are really and *bona fide* such. At all events, a sufficient probable ground of defense has been raised to entitle the complainant to a judicial examination and to render it inexpedient that the property should be sold until such an examination can be had.

Entertaining these views as to the relative rights of the

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parties, and being convinced by the showing which has been made that there is at least ground for questioning the rights of the bondholders, it is unnecessary that I should examine the affidavits and papers in detail, as that will be more proper on the final hearing of the cause.

Without expressing any opinion on the question whether the bondholders are entitled, in any event, to set up an equity to have the bonds of the corporation enforced for their benefit—a question which has been somewhat discussed, if not decided, by the Supreme Court of Florida—I am of opinion that a temporary injunction ought to issue in this case to prevent the governor from selling the road or other property of the company, and from taking possession of the same, until the further order of the court.

The parties, however, will have leave at any time to move for a dissolution of this injunction, on filing answers and showing positively the fact that they are *bona fide* purchasers of state bonds, unless, on further consideration, the court should be of opinion that it would prejudice the rights of the parties to make a sale before final decree.

JACKSONVILLE, DECEMBER TERM, 1877.

RICHARD C. DENNIS v. THE COUNTY OF ALACHUA.

1. The act of March 2, 1867 (14 Stat., 558), for the removal of causes from the state to the federal courts, is not repealed by the act of March 3, 1875 (18 Stat., 470), on the same subject.
2. It is not necessary that the petition for removal should be signed, or the affidavit required by the act of 1867 made by the petitioner in person. Both may be done by his attorney in fact.
3. The fact that the bond for removal was signed by the petitioner by attorney, or that the sureties on the same are insufficient, are not good grounds for remanding the cause to the state court.
4. When a cause is once removed from a state to a federal court, and there are no jurisdictional objections to its remaining there, it will not be remanded or dismissed for defects in the bond for removal.

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- insufficiency of sureties thereon, or other irregularities which can be remedied or have not worked any prejudice to the opposite party.
5. A defect or omission in the transcript of the record of the state court can be cured by *certiorari*. It is not a ground for remanding the cause.
 6. The approval, by the state court, of the bond for removal of a cause, is not necessary to the jurisdiction of the federal court.

The cause was removed from the circuit court of Alachua county to the United States circuit court, upon affidavit by the attorney in fact of the plaintiff, that from prejudice or local influence the plaintiff would not be able to obtain justice in the state court.

The counsel for defendant thereupon moved to remand the cause to the state court, on grounds which are stated in the opinion of the court.

Messrs. Thomas F. King, R. T. Taylor, L. I. Fleming, J. J. Daniel and F. P. Fleming, for the motion.

Messrs. E. M. Cheney, J. B. C. Drew and A. A. Knight, *contra*.

SETTLE, District Judge. Nine reasons are assigned by the counsel for the defendant, in support of the motion to remand this case to the circuit court for the county of Alachua, fifth judicial circuit of Florida.

First. It is contended that the application of the plaintiff, for the removal of the suit from the state to the federal court, was not made "before or at the term at which the suit could be first tried."

The suit was commenced in April, 1877, by the plaintiff, a citizen of Massachusetts, against the county of Alachua, in the state of Florida.

It does not appear from the record that any action was taken at the November term, 1877, of the circuit court for the county of Alachua, further than to file the order of the state judge overruling the plaintiff's demurrer to the defendant's seventh plea.

It does appear, however, that the plaintiff joined issue upon the defendant's seventh plea, on the first day of May, 1878, after the suit had been removed to this court.

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So it would seem the suit was not at issue in the state court at the time the plaintiff filed his petition for removal.

But if it be conceded, as contended for by the defendant, that the plaintiff should have joined issue upon the defendant's seventh plea at November term, 1877, and that the suit should then have stood for trial, still, in view of such decisions of the courts as I have been able to examine, and upon the reason of the law, I am constrained to hold that the application is in apt time if the petition be filed at any time before the trial or final hearing of the suit in the state court; if, before or at the time of filing said petition, the party makes and files in the state court an affidavit stating that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in the state court.

The act of 1875 (18 Stat., 470) does not, in express terms, repeal the act of 1867 (14 Stat., 558), nor, indeed, any other acts, and it can not do so by implication, unless there be "such positive repugnancy between the provisions of the new law and the old, that they can not stand together or be consistently reconciled:" *Wood v. United States*, 16 Pet., 342.

"A repeal by implication is not favored. The bearing of the courts is against the doctrine, if it be possible to reconcile the two acts of the legislature together:" *McCool v. Smith*, 1 Black., 459.

So far from there being any conflict between the acts of 1875 and 1867, they stand together in perfect harmony, and with them also stand other enactments, which are necessary to cover the whole ground and meet all the cases which congress seems, from time to time, to have had in contemplation; *e. g.*, the legislation which provides for the removal of suits brought in state courts against the officers of the United States. Instead of restricting the right of removal of causes from state to federal jurisdiction, it seems to have been the purpose of congress, in the act of 1875, to extend the jurisdiction of the circuit courts to the utmost limit allowed by the constitution, with the single exception as to the amount involved, in certain classes of cases.

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Judge Dillon, in his able *brochure* on the removal of causes from state courts to federal courts, at page 28, says: "The third subdivision of that section (639 Revised Statutes, corresponding to the act of 1867) is broader than the act of 1875, provides for a class of cases not provided for by that act, and while the point is not free of doubt, the true view seems to be that at all events this portion of the 639th section remains unrepealed. This has been decided to be so in the eighth circuit by Mr. Justice Miller, and generally in the courts of that circuit, and, so far as we are advised, by the circuit courts elsewhere."

In the United States circuit court, district of Kentucky, at May term, 1877, in *Cook v. Ford*, reported in twenty-third volume Internal Revenue Record, page 218, Ballard, District Judge, delivered an able opinion upon the precise question now under consideration, and after quoting with approbation the above extract from Judge Dillon, says: "There seems to be the most substantial reason for allowing such citizen of another state to remove a suit at any stage before trial or final hearing, when it appears, owing to such prejudice or local influence, he cannot obtain justice in the state courts. * * * This prejudice or local influence may not exist in the first stage of the cause, or if it existed, it may not then be discovered. It may be subsequently developed."

Mr. Justice Miller, in *Araphoe County v. Kansas Pacific Railway Company et al.* 4 Dill., 277, says: "I have decided that the act of 1867, concerning prejudice, remains in full force. The reason is that this statute (of 1875) does not repeal all acts on the same subject, but only such as are in conflict. It is very guarded. * * * In all cases of removal under this act (of 1875), application must be made at the first term, or before the term at which it could be tried or heard. No such provision is made in the act of 1867, or in that of 1866."

Second. The second ground in support of the motion to remand is: "That the petition for removal is not made by the plaintiff in person."

It is not necessary that it should be so made. The peti-

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tion, in this case, is evidently copied from the form which Judge Dillon says is in common use in the eighth circuit, and following that form it is signed by the attorney for the plaintiff. This, I think, is in accordance with the usual practice, and entirely sufficient.

Third. "That the affidavit for removal is not made by the plaintiff in person."

The affidavit, of prejudice and local influence, is made by one Leonard G. Dennis, who swears that he is the agent and attorney in fact of the plaintiff.

Judge Dillon, Removal of Causes, pages 61-2, says that this affidavit should, whenever possible, be made by the party himself; but he adds: "As the party himself is a non-resident, and may not be as well advised as his local agent or attorney as to the existence of local influence or prejudice, there would seem to be no reason for requiring the affidavit, in all cases, to be made by the party, and some parties, as infants or persons *non compos mentis*, could not make it."

I concur in this reasoning, believing that cases are of frequent occurrence, wherein the local agent or attorney can make the affidavit with better knowledgo and much more propriety than the non-resident party could do so.

Fourth. "That the bond is not executed by the plaintiff or his attorney-in-fact."

Fifth. "That the bond is signed by the attorney-at-law of the plaintiff."

True, the bond is signed "Richard C. Dennis, by Ed. M. Cheney, attorney," but it is also executed by three other parties, and what possible difference can it make, to any one, whether the bond be executed by A or B, provided it be in all respects sufficient?

The bond is copied, *verbatim*, from the form given by Judge Dillon, as appropriate in such cases.

Seventh. The seventh ground is, "that the bond is not in fact a good and sufficient security."

In support of this objection to the bond, the counsel for the defendant has filed with the clerk of this court an affidavit made by one Carlisle, and taken before a justice of the

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peace for Alachua county, on the 10th day of December, 1878, which tends to prove that the bond is insufficient.

The petition and bond for removal were filed in the state court in April, 1878, and a copy of the record and papers was filed in this court on the first Monday in May, 1878. As I can only look at the record and papers properly in the case in passing upon the questions before me, I do not see that this affidavit can have the slightest weight in influencing my judgment upon the motion to remand; it possibly should be considered in determining what action this court shall take upon the bond.

There are many cases to be found in the recent numbers of law publications, to the effect that when a case is once removed from a state to a federal court, and there are no jurisdictional objections to its remaining there, it will not be remanded or dismissed for defects connected with the giving of the security or bond, or other irregularities which can be remedied, or which have not worked any prejudice.

Eighth. The eighth objection is, "that the bond does not provide for the payment of costs, as prescribed by the act of congress of March 3, 1875."

Let it be conceded that the act of 1875 requires the bond to be in the form suggested; still, from what has been said, it follows that the defect furnishes no sufficient ground for remanding the cause.

In order, however, to obviate all the objections to the bond on file, I deem it proper to require the plaintiff to file in this court a sufficient bond, under the act of 1875, within the next thirty days.

Ninth. "That the clerk of the state court does not certify that copies of all the papers and proceedings in said court have been transferred to this court."

If the counsel for the defendant are prepared to suggest a diminution of the record, they will be entitled to a *certiorari* to bring into this court a full and true record of all the papers and proceedings in the state court.

Sixth. Having disposed of all the other grounds relied upon in support of the defendant's motion, we will now consider

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the sixth, which was pressed with much zeal upon the argument:

“That the bond was not accepted or approved by the judge of the state court.”

While the Supreme Courts of some of the states, among them Massachusetts, Wisconsin and Virginia, have held this to be necessary before a removal can be effected, others, Rhode Island and Missouri, for instance, have held that the filing of the petition and bond, *ipso facto*, suspends the jurisdiction of the state court. The Supreme Court of Missouri, in the case of *Herryford v. The Aetna Insurance Company* (42 Mo., 148), uses the following emphatic language: “When a party makes an application for a removal of the cause in the manner required by the act of congress, it is error in the state court to proceed further in the matter, and every subsequent step is *coram non jndice*.”

While there is this conflict of opinion between the Supreme Courts of the different states, there is a uniform current in the decisions of the federal courts, to the effect, that if the case be within the act of congress, and the petition is in due form, accompanied by the required bond, the jurisdiction of the state court ceases, *eo instanti*, upon the filing of the petition and bond, in the state court, either in term time or in vacation. Drummond, Circuit Judge, and Blodgett, District Judge, in *Osgood v. The Chicago, Danville & Vincennes Railroad Company*, 6 Biss., 330, say: “Having filed the petition and bond with the clerk in the given case, the applicant has done all that the statute requires. He need not call upon the court to act at all. No order is to be made in court, at least the statute names none, unless the mandate that the court shall accept the petition and bond implies one.”

Judge Dillon expresses the same opinion at page 66 of his pamphlet on the removal of causes.

Woods, Circuit Judge, in *Ellerman v. The New Orleans, Mobile & Texas Railroad Company*, 2 Woods, 120, says: “The presentation of the proper petition and bond is, by the act of congress, as well as by the decisions of the Supreme

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Court of the United States, effectual to suspend all the powers of the state court in which the suit is," and he cites, for this position, the cases of *Insurance Company v. Dunn*, 19 Wall., 214; *Insurance Company v. Morse*, 20 Wall., 445; *Kanouse v. Martin*, 15 How., 198, and *Gordon v. Longest*, 16 Pet., 97.

I might well stop here, but the language of Mr. Justice Strong, sitting in the United States Circuit Court for the western district of Pennsylvania, in June, 1878, since the passage of all the acts on the subject of removals, is so forcible and so appropriate to the point under consideration, as to justify a quotation from him, even after citing the decisions of the Supreme Court to the same effect.

In *Taylor v. Rockafeller* (6 Reporter, 226), where the state court had adjudged that the record and petition did not exhibit a case proper for removal under the acts of congress, and had refused to part with its jurisdiction, Mr. Justice Strong says: "If the petition and record exhibited a case which the petitioners had a right to remove, it was not in the power of the state court to deny the right by any judgment it could give. The act of congress declares that after the petition and bond are filed, the state court shall proceed no further in the suit. The petition is filed in the suit. It is thus made part of the record, and, by the act of filing, the suit is withdrawn from the jurisdiction of the state court. It is to be observed, that no order of the state court for a removal is necessary, certainly none since the act of 1875; nor is any allowance required. The allowance is made by statute."

Learned counsel contend that this construction is not courteous to the state tribunals, and that it will destroy the comity which ought to exist between the federal and the state courts.

I should much regret such a result, since there is in this state at least, the best understanding, both officially and personally, between the judges of the federal and state courts.

But the ruling will give no just cause of offense, and I apprehend none will be taken, for it is not a matter of courtesy or comity, but one of positive law, made in pur-

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snance of the constitution of the United States, and binding alike upon the federal and state courts. Neither should be superserviceable in the effort to appear courteous, when both are bound by a positive rule of law which compels the one to relinquish and the other to take jurisdiction.

The state is supreme within its sphere, but the "constitution and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to contrary notwithstanding:" Const. of the United States, article vi.

The federal government cannot submit the interpretation of its constitution and laws to any tribunals save its own, and this fundamental principle has been so long and so well understood that its application should not produce the least sensitiveness in any quarter. The motion to remand the case to the state court is denied.

JACKSONVILLE, MAY TERM, 1879.

(No. 1).

THE WESTERN DIVISION OF THE WESTERN NORTH CAROLINA
RAILROAD COMPANY v. GEORGE F. DREW, GOVERNOR
OF FLORIDA, THE FLORIDA CENTRAL RAILROAD ET AL,

(No. 2).

SAME v. GEORGE F. DREW, GOVERNOR OF FLORIDA, THE
JACKSONVILLE, PENSACOLA & MOBILE RAILROAD COM-
PANY ET AL.

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(No. 8.)

J. FRED SCHUTTE ET AL. v. THE FLORIDA CENTRAL RAILROAD COMPANY ET AL.

(Before BRADLEY, Circuit Justice).

1. Depositions of Dutch bondholders, complainants, in a suit in equity, were taken in Holland. Before the depositions were actually taken by the examiner their counsel had read to them the interrogatories, and had prepared their answers in the English language. *Held* (1), that the fact that the witnesses had heard the interrogatories in advance was not a ground for suppressing the depositions; and, (2), that examination of witnesses should be made by the examiner, and not by counsel, in advance, and because this was not done in this case the depositions should be suppressed.
2. Equity rule sixty-seven authorizes the court to appoint examiners for the taking of depositions orally, outside as well as inside its territorial jurisdiction.
3. Equity rule seventy-eight does not change the English practice, and does not allow, generally, the oral examination of witnesses on the trial; it permits witnesses to be so examined merely to verify some document referred to in the pleadings, or to establish some fact of a formal character which has been inadvertently omitted in the testimony.
4. Certain parties purchased a railroad and received a deed therefor, but left a part of the purchase price unpaid, and then procured an act of the legislature, by which they, as purchasers and owners, were incorporated. *Held*, that the company so formed took the railroad, subject to the vendor's lien for the unpaid purchase money.
5. The consolidation of said company with another did not discharge said lien. The notice of the lien with which the first company was charged affected also the consolidated company.
6. Where trust funds were fraudulently used by a trustee to purchase stock in a railroad company, and said company was afterwards, in pursuance of authority granted by the legislature, consolidated with another company; *held*, that the beneficial owner of the trust funds, having knowledge of the misappropriation, and suffering the trustee to retain possession of the stock in the new company, must seek the enforcement of his equities arising from such misappropriation against the stock in the consolidated company, held by the unfaithful trustee.
7. Where such beneficial owner promoted and acquiesced in the issue and sale of bonds by the new consolidated company, it could not except to the *bona fides* of the issue and sale, and the holders of the

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bonds so issued had a better equity as against the property of the railroad company than such beneficial holder.

8. A railroad company issued its bonds, which, by virtue of an act of the legislature, the officers of the state received in exchange for an equal amount of state bonds. The same act created a statutory mortgage in favor of the state, to secure the payment of the bonds of the railroad company, for which the state bonds were exchanged. It was decided by the Supreme Court of the state, that said state bonds were issued without constitutional authority, and the state was not bound thereby. *Held*, that under these circumstances the holders of the state bonds, given in exchange for the railroad bonds, had a right to enforce, for their own benefit, the said statutory mortgage in favor of the state.
9. The fact that the bonds of the railroad company were issued and exchanged for state bonds, in order that the stockholders of the railroad company might use the proceeds of the state bonds for their own private advantage, and they were so used, and not for the purposes contemplated by the statute which authorized the exchange, is no defense against the railroad bonds in the hands of a *bona fide* holder.
10. The possession of a negotiable bond is strong *prima facie* evidence of just title, and, in ordinary cases, throws upon the party questioning it the burden to show that the holder had notice of some vice or defect which vitiates his title.
11. Where the lien of bondholders on railroad property is created by statute, the statute regulates their rights, notwithstanding the fact that without its aid a resulting equity would have arisen in their favor.
12. Where, at the instance of bondholders secured by a mortgage lien upon a railroad, a receiver has been appointed to take possession of and preserve the railroad and conduct its business, the proceeds and profits of the business in the hands of the receiver are subject to the charges of administration and management and the liens and trust in behalf of which the receiver was appointed. Neither the railroad company itself nor any party whose claim is based on the company's rights, can demand any of the income in the receiver's hands until the prior liens have been satisfied.
13. The act of the legislature of Florida, of January 8, 1833, relating to mortgages, was not intended to prevent a court of equity from taking possession of mortgaged property, where, by the negligence or misfeasance of the mortgagor it was being wasted so as to jeopard the security of the mortgagee.

IN EQUITY. The cases above mentioned being intimately connected, were argued and decided together, upon the pleadings and evidence. They related to two railroads in

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Florida; the Florida Central, extending from Jacksonville to Lake City, and the Jacksonville, Pensacola & Mobile, extending from Lake City to the Chattahoochee river, with the branch from Tallahassee to St. Mark's. Suit No. 1 related to the Florida Central railroad, suit No. 2 to the Jacksonville, Pensacola & Mobile railroad, and suit No. 3 to both.

The complainants in suit No. 3 were Hollanders, who had purchased over \$3,000,000 of Florida state bonds, issued in 1870, in exchange for the bonds of the two railroad companies above mentioned. The whole amount of state bonds issued was about \$4,000,000. Of these \$3,000,000 were issued in exchange for bonds of the Jacksonville, Pensacola & Mobile railroad company, and \$1,000,000 in exchange for the bonds of the Florida Central railroad company.

The railroad bonds were by the statute authorizing the exchange made a lien on the railroads of the companies issuing them, respectively. They were not to exceed sixteen thousand dollars per mile. The \$4,000,000 being in excess of this, some of the state bonds, two hundred and twenty-four in number, were returned and canceled, and certain of them were never sold. The Supreme Court of Florida decided that the state bonds referred to were issued contrary to the provisions of the state constitution, and were void, but that the state held the bonds of the railroad companies as trustee for those who had purchased its own bonds, and that these purchasers, for the amount of state bonds purchased by them, had a right to the lien of the companies' bonds held by the state. Hence, Schutte and others, as holders of the state bonds, brought their bill against the two railroad companies, to foreclose this lien and recover their money, by a sale of the roads.

With regard to the Jacksonville, Pensacola & Mobile railroad, there was an outstanding lien upon it of \$472,000 and interest for unpaid purchase money due to the trustees of the internal improvement fund of Florida, who had sold the road in 1869 to parties from whom the Jacksonville, Pensa-

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cola & Mobile railroad company subsequently acquired it. Therefore, the said trustees were made parties to the suit.

The two suits, number one and number two, were brought a short time prior to suit number three, by the western division of the Western North Carolina railroad company, claiming an interest in the two Florida railroads prior and superior to that of Schutte and the other Dutch bondholders. The circumstances on which this claim was founded were these: In 1868, or 1869, the state of North Carolina granted to the western division of the Western North Carolina railroad company \$6,000,000 of North Carolina state bonds, the state taking a large portion of the capital stock of the company. George W. Swepson, the president of the company, co-operating with Milton S. Littlefield, who succeeded him as president, disposed of these bonds in New York, and fraudulently used a large part of their proceeds in purchasing a controlling interest in the Florida railroads above mentioned. The companies owning these roads were in default in the payment of former issues of bonds, which had been guaranteed by the internal improvement fund of Florida, and under a law of the state, the Florida Central railroad was sold in 1868, and the Jacksonville, Pensacola & Mobile, consisting, originally, of two roads, was sold in 1869, and new companies were organized by the purchasers to carry them on. Swepson and Littlefield, with the North Carolina funds of which they acquired the possession in the manner above stated, purchased a large majority of the new stock of the Florida Central railroad company, and furnished the means for purchasing the Jacksonville, Pensacola & Mobile road, when it was sold in 1869; that is, they bought up and furnished the old bonds with which the purchase money was paid by the nominal purchasers, amounting to \$960,300 of said bonds. The North Carolina company alleged that this fraudulent appropriation of its money was not discovered for a long time, and that a resulting trust arose in its behalf to recover and have the property procured thereby. The principal question in the case was, whether the North Carolina company, after its discovery of the fraud, did not deal with Swepson and

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Littlefield in such a manner as to ratify their action as stockholders and officers of the Florida roads, in issuing the bonds of the two Florida companies for which the Florida state bonds held by the Dutch bondholders were exchanged. The court was of opinion that the evidence in the case showed such a ratification.

The latter company, however, contended that the Dutch bondholders knew of certain fraudulent practices used in putting out these bonds, and that hence they were not *bona fide* holders and ought to be postponed to it.

Messrs. J. B. Stewart and J. K. Herbert, for the western division of the Western North Carolina railroad company.

Messrs. M. H. Carpenter, W. G. M. Davis and C. D. Willard, for J. Fred Schutte and others.

Messrs. J. M. Baker and J. T. Walker, for the Florida Central railroad company.

Mr. G. P. Rainey, Attorney-General of Florida, for the trustees of the internal improvement fund.

Mr. Henry R. Jackson, for the holders of bonds of the Pensacola & Georgia railroad company.

Before the final hearing, certain preliminary questions were raised and decided.

Mr. Stewart, for the western division of the Western North Carolina railroad company, moved to suppress certain depositions taken by the Dutch bondholders in Holland, on the ground that the witnesses came before the commissioners who took the depositions with prepared answers in writing in the English language, and on being questioned why they used such prepared answers, said that it was more convenient and would save time. Another ground for the motion was, that the interrogatories had been read in advance to the witnesses by the counsel for the bondholders.

In support of his motion, he cited 3 Greenleaf on Evidence, sec. 324; *Shaw v. Lindsey*, 15 Ves. Jr., 380.

BRADLEY, Circuit Justice. The objection to the depositions, that the witnesses had seen the interrogatories before being called on to give their testimony, is not a good one.

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According to the American practice, the showing of the interrogatories to the witnesses in advance of their answers, is not open to objection.

The fact, however, that the answers of the witnesses were prepared in writing by their counsel in advance, is fatal to the depositions. The examination should be made by the examiner, and not by counsel, before the witnesses are brought before the examiner to give their testimony. The depositions must be suppressed.

Mr. Carpenter moved to suppress certain depositions taken for complainant in suits numbered one and two, in the city of New York, on the ground that they were taken before an examiner appointed by the United States circuit court for the northern district of Florida, and under equity rule sixty-seven, the court had no authority to appoint an examiner beyond its own territorial jurisdiction.

BRADLEY, Circuit Justice. The rule should be literally construed. It was intended to authorize the appointment of examiners outside as well as inside the territorial jurisdiction of the court. The taking of testimony before an examiner, orally, in the presence of the parties, is much more satisfactory than taking it by commission, and the rule should be construed so as to allow this to be done whenever a party desires it. The motion to suppress the depositions is overruled.

Counsel proposed to examine witnesses, orally, before the court upon the trial of the causes.

BRADLEY, Circuit Justice. I can not allow this to be done, except for the purpose of verifying documents referred to and set out in the pleadings. A court of equity will not sit and try causes by the examination of witnesses in open session, as if it were trying a case by a jury. It is not the purpose of the seventy-eighth equity rule to allow this to be done. That rule only reserved the power in the court to verify documents set out in the pleadings, or to establish some fact of a formal character which had been inadvertently

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omitted in the evidence, and which would not require an extended examination. In other words, the seventy-eighth rule does not alter the English practice on the subject. The substantial evidence in the case should be taken according to equity rule sixty-seven.

After disposing of these preliminary questions, the causes were argued on the merits by the counsel of the parties respectively, and the opinion of the court given as follows:

BRADLEY, Circuit Justice. These cases involve vital questions relating to the title of and incumbrances upon two railroads, namely, that called the Florida Central railroad, extending from Jacksonville to Lake City, and that called the Jacksonville, Pensacola & Mobile railroad, extending from Lake City to the Chattahoochee river, including the branches from Tallahassee to St. Mark's, and that leading to Monticello. It is conceded by all the parties that both roads were duly sold by the trustees of the internal improvement fund, under the internal improvement act, in 1868 and 1869, and those sales constitute a starting point upon which all the claimants rely. The Florida Central was thus sold on the 4th day of March, 1868, to William E. Jackson and his associates; and the Pensacola & Georgia railroad, being the road from Lake City to Quincy, and the Tallahassee railroad, being the road from Tallahassee to St. Mark's (which two roads constitute the greater part of the Jacksonville, Pensacola & Mobile railroad), were sold on the 20th day of March, 1869, to Franklin Dibble and his associates. Conveyances were made to the purchasers in pursuance of these sales. No question is made about the title acquired by the purchasers of the Florida Central railroad, nor of its subsequent devolution to the present company, called the Florida Central railroad company.

The legislature of Florida, by an act passed on the 29th day of July, 1868, on the application of the purchasers, incorporated them into a body politic by the name aforesaid, and as purchasers and owners of the road. As such purchasers and owners they were made a corporation, and

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authorized to organize as such, and "to declare the amount of which the stock in said Central railroad company should consist, and to divide the same into shares." They did organize, and created capital stock to the amount of 5,500 shares, took possession of their road and commenced to operate it. It is not denied that the greater portion of the capital stock was subsequently purchased by George W. Swepson, of North Carolina, who had the same transferred to Milton S. Littlefield. At least as early as the early part of 1870, Swepson and Littlefield, or one of them, held nearly all the stock of the road, and controlled and managed the company. The western division of the Western North Carolina railroad company has since claimed that it was the money of that company which Swepson and Littlefield used in the purchase of this stock, and that they misappropriated the same in making such purchases, and therefore became the holders of said stock for the use and benefit of said company. This has been conceded by Swepson and Littlefield, and the stock is now understood to be held for the use and benefit of the Western North Carolina railroad company, which has been substituted to the rights of the said western division. Thus far, therefore, we are not met by any controversy which calls for the adjudication of this court.

The history of the Jacksonville, Pensacola & Mobile railroad company, and the roads which it claims to have acquired, is more complicated. As before stated in that case, there were two roads purchased by the same parties, that of the Pensacola & Georgia railroad company, extending from Lake City to Quincy, with the branch at Monticello, and that of the Tallahassee railroad company, extending from Tallahassee to St. Mark's. Each of these companies had issued bonds under the internal improvement act, which were guaranteed by the internal improvement fund. Default in paying the interest on these bonds, and the installments due to the sinking fund, was the occasion of the roads being sold by the trustees. The sales were for amounts nearly equal to the principal of these outstanding bonds. The amount bid for the Pensacola & Georgia railroad was \$1,220,000, and

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the amount bid for the Tallahassee railroad was \$195,000, and the purchasers were allowed to pay the purchase money, if they could, in the said guaranteed bonds. They did bring in and surrender such bonds to the amount of \$806,600 of the Pensacola & Georgia railroad company, which were received at par, and \$153,700 of the Tallahassee railroad company, which were received at ninety-four and ninety-five cents to the dollar. It is conceded that a balance remained still to be paid of \$472,065, and that that amount of the bonds of the said two companies are still outstanding. For this amount a draft or check was given, which was never paid, and which the parties giving it did not intend to pay. But by giving this check as cash, the purchasers prevailed upon the agents of the trustees to deliver deeds for the property. It was a sheer fraud, and a lien for the balance of the purchase money, amounting to \$472,065, immediately arose in favor of the trustees, and has ever since attached to the property.

The holders of the outstanding bonds referred to are interested in this lien, because the purchase money which it represents is the fund on which the trustees rely for the payment of said bonds in relief of the internal improvement fund itself, so far as it is liable therefor; and, also, because the said purchase money is the proceeds of the property which constituted the security of the said bonds. The holders of the said outstanding bonds have, in divers ways, attempted to enforce their indirect claim to this purchase money, and to the lien for its payment; but the Supreme Court of the United States, in the case of the *State of Florida v. Anderson* (91 U. S., 667), decided that in view of all the complicated rights of the parties, the lien must be enforced by the state, or the trustees of the internal improvement fund, which the latter have endeavored to do, and which they seek to do in the suits now under consideration.

As against the Jacksonville, Pensacola & Mobile railroad company, the existence of this vendor's lien was adjudicated by the Duval county circuit court, by a judgment rendered, on the second day of April, 1874, and a recovery was had by the trustees for the principal and interest then due,

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amounting to \$661,845.55. This judgment was rendered in a suit brought by the state of Florida and the trustees of the internal improvement fund, against the Jacksonville, Pensacola & Mobile railroad company and Milton S. Littlefield; and although that judgment was subsequently reversed in part, yet, in a subsequent report of the same case in 16 Florida, 708, the Supreme Court declare that, on this point, the judgment of the Duval county circuit court was final, and that the matter was *res judicata*. But if it were not so, I have no hesitation in saying that the vendor's lien for the said unpaid purchase money, with interest and costs, was valid and binding on the Jacksonville, Pensacola & Mobile railroad company. The purchasers, Franklin Dibble and his associates, clearly held the railroads subject to the lien. They became incorporated as purchasers and owners of the property, by an act of the legislature of Florida, passed the 24th day of June, 1869, by the name of the Tallahassee railroad company; and this company, therefore, being constituted of the same persons, only clothed with corporate powers, received the property subject to the same lien. On the 25th day of May, 1870, the Tallahassee railroad company became consolidated with the Jacksonville, Pensacola & Mobile railroad company, under and by virtue of the 14th section of the act incorporating the latter company, passed June 24, 1869, entitled "An act to perfect the public works of the state;" and one of the terms of the consolidation was that the consolidated company, under the name of the Jacksonville, Pensacola & Mobile railroad company, should, and it did thereby assume all the debts and obligations of the Tallahassee railroad company, since its organization. This consolidation, by which the two companies joined their properties together, did not discharge the lien. The property of the Tallahassee company was brought into the common concern with all pre-existing equities attaching thereto. The consolidated company having, as one of its component parties, the Tallahassee company, which held subject to the lien, cannot be regarded as a *bona fide* purchaser without notice. The notice with which that company was affected, in rela-

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tion to the property brought with it into the common fund, affected also the consolidated company. Besides, the persons who held the principal part of the stock in and controlled the one company, likewise held the principal part of the stock in and controlled the other company.

As to the other parties in these suits, the western division of the Western North Carolina railroad company concede the existence and priority of the said lien, and the holders of the state bonds, issued in 1870, in exchange for the bonds of the Jacksonville, Pensacola & Mobile railroad company, and of the Florida Central railroad company, who are represented by the complainants in the bill of J. Fred. Schutte and others, do not contest the lien, having entered into amicable arrangement with the greater portion of the holders of the outstanding bonds, who are interested therein.

I shall, therefore, hold, for the purposes of this case, that the trustees of the internal improvement fund are entitled to the first lien on the property of the Jacksonville, Pensacola & Mobile railroad company, extending from Jacksonville to Quincy, and from Tallahassee to St. Mark's, including the Monticello branch of the roads.

I will now proceed to the controversy which subsists between the western division of the Western North Carolina railroad company and the holders of the state bonds issued in 1870. The former claims to be entitled to certain equities arising from the fraudulent use of its moneys by George W. Swepson and Milton S. Littlefield, in purchasing the bonds and property of the Pensacola & Georgia railroad company and the Tallahassee railroad company, before the devolution of said property to the Jacksonville, Pensacola & Mobile railroad company. The latter, namely, the holders of the state bonds, claim that they are *bona fide* holders of said bonds, without any notice of the frauds committed by Swepson and Littlefield, or of the equities of the North Carolina company, and that they are, therefore, entitled to have the railroad and property of the Jacksonville, Pensacola & Mobile railroad company applied to the payment of their bonds, before any relief is granted to the North Carolina

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company. This is the real controversy in these cases, although the said bondholders (who, being mostly residents of Holland, may, for convenience, be called the Dutch bondholders), affect to ignore the claims of the North Carolina company, and seek to have a decree irrespective thereof.

The court then entered upon an elaborate discussion of the facts upon which this controversy turned, and reached the following conclusions:

The bonds used by F. Dibble and his associates in payment of the bid for the two railroads above mentioned were furnished to them by Swepson, and Swepson procured the same by a fraudulent use of money in his hands, produced by the sale of North Carolina state bonds belonging to the western division of the North Carolina railroad.

On June 24, 1869, an act was passed by the Florida legislature by which F. Dibble and his associates were incorporated under the name of the Tallahassee railroad company, and, as purchasers and owners of said railroads, were clothed with corporate powers, and by which no further conveyance from them of said railroads to the new corporation was contemplated, and by which said new corporation was invested with the right to hold, operate and enjoy said railroads, and in the enjoyment thereof were to have the benefit of the provisions of the original charter of the Pensacola & Georgia railroad company.

Subsequently Dibble and his associates executed a deed of confirmation and release to the Tallahassee railroad company.

The Tallahassee railroad company being thus duly organized, took possession of the said railroads. It, however, maintained a separate existence for only eleven months, when it became amalgamated with the Jacksonville, Pensacola & Mobile railroad company.

By virtue of the act incorporating said last-named company, and several acts amendatory thereof, the governor of the state was directed to deliver to the company coupon state bonds to an amount equal to \$16,000 per mile for the whole line of road owned by the said company, in exchange for its first mortgage bonds, and a lien in the nature of a statutory

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first mortgage was given to the state upon those parts of the road for which the state bonds were delivered, and upon all the property of the company thereto appertaining, and upon the powers and franchises of the company; and on failure of the company to pay either principal or interest for twelve months, the governor was directed to sell all the property subject to said lien and to apply the proceeds of the sale to the payment of the bonds issued by the state. The said acts also authorized the several companies owning the road, or parts of road, from Quincy to Jacksonville and from Tallahassee to St. Mark's, and the branch to Monticello, or either of them, with the consent of the Jacksonville, Pensacola & Mobile railroad company, to consolidate with the latter company, so as to become one corporation under name of the latter company.

It was further provided that the governor should deliver to the president of the Jacksonville, Pensacola & Mobile railroad company bonds of the state to the amount of \$16,000 per mile on receiving from the president first mortgage bonds of like amount on any part of the road between Quincy and Jacksonville, not exceeding one hundred miles, provided said railroad company or companies should not issue first mortgage bonds to a greater amount than \$16,000 per mile.

On May 25, 1870, by authority of said legislation, the Tallahassee railroad company was consolidated with the Jacksonville, Pensacola & Mobile railroad company, and the effect of this consolidation was to vest in the consolidated company the property and franchises of both the companies of which it was formed.

Upon this state of facts the court held that the North Carolina railroad company must seek for the enforcement of any equities it might have by reason of the misappropriation of its moneys by Swepson and Littlefield, through its right to the interest which they acquired as stockholders in the Jacksonville, Pensacola & Mobile railroad company. If the North Carolina railroad company knew of the destination which its moneys had taken and suffered Swepson and Little-

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field to retain possession of the stock and control of the Florida corporation, it must abide by their acts.

The court found the following further facts: Under the powers conferred by its charter and the amendments thereto, the Jacksonville, Pensacola & Mobile railroad company, in May or June, 1870, issued its bonds to the state of Florida to the amount of \$3,000,000, and received therefor the bonds of the state to the same amount, which were delivered to Littlefield, the president of the company, for disposition and sale. Littlefield had already made an agreement with S. W. Hopkins & Co., of New York and London, for the disposal of the said bonds which he expected to receive from the state. This agreement purported to treat for \$4,000,000 of state bonds, to be issued to the railroad company, of which \$1,000,000 were to be issued by the Florida Central railroad company, of which Swepson had the control.

Three days after this arrangement with Hopkins & Co. to dispose of bonds not yet issued, Swepson and Littlefield, whose peculations had now been discovered by the agents of the North Carolina railroad company, entered into an arrangement with them, on April 16, 1870, for a participation in the proceeds of the Florida state bonds.

By this agreement it was provided that the proceeds of Florida state bonds should be equally divided between the said North Carolina railroad company and the said Florida railroad until the North Carolina railroad company should receive the sum reported by Littlefield and Swepson as due to it, to wit, the sum of \$1,287,436, and for the faithful performance of this contract, Swepson and Littlefield pledged all the interest which they owned or claimed, or which they as individuals had a right to control, in said Florida railroad.

By this agreement it was incontrovertible that the North Carolina railroad company acquiesced in the organization of the Florida railroad companies by Swepson and Littlefield, the issue of stock therein to them, and the issue of the bonds in question in this suit. Not only did the North Carolina railroad company acquiesce in the issue of the bonds, but it

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urged and promoted the sale thereof. The principal contest of this company consisted in endeavoring to get the proceeds of the bonds after they were sold, and this contest was continued until the three thousand state bonds issued to the Jacksonville, Pensacola & Mobile railroad company, in exchange for its own bonds, had been sold and disposed of. In view of these facts, the North Carolina railroad company is to be held as participating in putting out these bonds on the money markets of the world, and it cannot be heard to except to the *bona fides* of their issue and sale. On this state of facts the court held as follows:

The presumption is, therefore, that the complainants in the case of J. Fred. Schutte, who have produced these very bonds, are *bona fide* holders, there being not the slightest evidence to the contrary. As such, they are entitled to relief as against the railroad and property of the Jacksonville, Pensacola & Mobile railroad company, notwithstanding and prior to any equities the North Carolina company may be entitled to. The equities of the latter company are to be effected as equitable owners of the stock held by Swepson and Littlefield in the Jacksonville, Pensacola & Mobile railroad company, and can rise no higher than the rights of that company itself as against third parties dealing with it in good faith.

The court then proceeded to consider the question whether the holders of the state bonds had, by reason of being such, any lien, legal or equitable, against the railroad and property of the Jacksonville, Pensacola & Mobile railroad company.

On this question, the court referred to the cases of *Holland v. The State of Florida*, 15 Fla., 456; *The State of Florida, v. The Florida Central Railroad Co.*, Id., 690, and *Trustees of the Internal Improvement Fund v. The Jacksonville, Pensacola & Mobile Railroad Co.*, 16 Fla., 708, in which it was held that the state bonds which these parties hold were created and issued in violation of the constitution of the state, and were, therefore, absolutely void; yet, that under the statute, the state held the bonds of the company, and the mortgage lien secured thereby, for the benefit of the holders of the state bonds, and that the bondholder is not restricted

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to the amount paid by him for the bonds, but has all the rights of a "holder," including that of receiving the full amount of his bonds.

The court then proceeded to say :

A careful examination of the statute leads me to concur in this view of the subject. But the decision of the state court on a question of the construction of a state statute, if not absolutely binding on this court, is, at least, entitled to the very highest consideration and respect, and is to be regarded as of great authority. I feel compelled, therefore, to hold that the holders of the state bonds have a right to the enforcement of the mortgage lien created by the statute by virtue of the bonds of the Jacksonville, Pensacola & Mobile railroad company given in exchange therefor. As pertinent to this question, see *Young v. The Montgomery & Eufaula Railroad Company*, 2 Woods, 606. The result of this opinion is, that next to the lien for the balance of purchase money due to the trustees of the internal improvement fund, the complainants in the case of J. Fred. Schutte and others, are entitled to a mortgage lien upon the Jacksonville, Pensacola & Mobile railroad, extending from Lake City to Quincy, and from Tallahassee to St. Mark's, including the branch to Monticello, with all its equipment property and franchises, for the payment of such portion of the bonds held by them, and the interest accrued thereon, as are to be considered as having been exchanged for the bonds of that company, and a first mortgage lien for the payment of the same bonds and interest upon the railroad extending from Quincy to the Chattahoochee river, and its equipment property and franchises, reserving, however, for the present, further consideration of the claims of J. W. Gibbes, who has intervened *pro intreses suo*, in respect to that portion of the line.

The said J. Fred. Schutte and others, holders of said state bonds, will also be entitled to a decree dismissing the bill of the Western North Carolina railroad company which relates to the Jacksonville, Pensacola & Mobile railroad.

The court then proceeded to the consideration of the case

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relating to the Florida Central railroad company and its property. The main question in this controversy was whether the corporation itself became bound by the bonds which were issued in its name, the amount of which, as before stated, was \$1,000,000.

The first inquiry naturally was, whether the said company had power to issue such bonds. After an examination of the several acts of the legislature of the state of Florida relating to this subject, and of the case of *The State v. The Florida Central Railroad Company*, 15 Fla., 690, decided by the Supreme Court of the state, the conclusion was reached, that the Florida Central railroad company did have all the requisite powers for issuing such bonds as were issued in this case in the name of the company, and that if the bonds were issued and exchanged for state bonds, the misappropriation of the latter by the agents of the company would not relieve it from its obligations, arising upon its own bonds, to the *bona fide* holders of state bonds exchanged therefor.

The court said: The counsel for the North Carolina railroad company and for the Florida Central railroad company, contend that the bonds executed by the company, and exchanged for state bonds, were executed for an unlawful purpose, namely, for the purpose of paying private debts or for speculation, and not for the purpose of aiding the Jacksonville, Pensacola & Mobile railroad company in the speedy construction of its road, nor for any corporate purpose of the Florida Central railroad company itself.

Supposing this to be true, how can the corporation itself, or any one claiming under it, raise this objection after having actually executed its bonds and procured the state bonds in exchange therefor, and authorized them to be sold to the public? It seems to me that there is a clear estoppel in the case. It would be to allow the company to perpetrate a fraud upon the public to allow such a defense to prevail. If the stockholders have used the money produced by the state bonds for their own purposes, instead of using it in aid of the Jacksonville, Pensacola & Mobile company, or for the corporate purposes of their own company, neither they nor

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the corporation can be permitted to allege their own dishonesty as a reason for avoiding the binding obligation of their bonds. The fact seems to have been that the arrangement for making this issue of bonds had in view a distribution of their proceeds amongst the stockholders in proportion to their several interests. If there was not a fair deal; if some got more than their share, and others less, they must look to one another for an adjustment of their respective equities. They ought not to be permitted, at this late day, after the state bonds procured in exchange have been sold to purchasers, to plead that their bonds were created for an unlawful purpose.

The Florida Central railroad company itself is clearly estopped from making such a defense. The North Carolina company is also estopped, because in the agreements and proceedings which have been referred to, in which it was a party, it acquiesced in the issue of the bonds, and only claimed to share in the proceeds thereof.

The truth is, that the agents of the North Carolina company seem to have been very well satisfied with the issue of the bonds, thinking, by means thereof, to be able to snatch something out of the fire by way of indemnity for the losses sustained by that company through the malfeasance of Swepson and Littlefield, and I think that said company is concluded from disputing the validity of the bonds as against those who have, in good faith, purchased the state bonds issued in exchange therefor. They may have been unfortunate in their endeavors to get the proceeds of the bonds after they were sold, but that was not the fault of the purchasers, and is no reason for depriving them of their property.

The question then arises, whether the complainant in the suit of J. Fred. Schutte and others are *bona fide* holders of the bonds, which they produce in this litigation.

The possession of the bonds is strong *prima facie* evidence of just title, and in ordinary cases, throws upon the party questioning it the burden of showing that it is not *bona fide*, that the holder had notice of some vice or defect which vitiates the title. No such notice is shown in this case.

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The court then went into a discussion of the evidence introduced to show that the holders of said bonds procured them *bona fide*, and announced the following conclusion:

In my judgment, upon the whole case as presented by the evidence and pleadings, the said bondholders are to be regarded as *bona fide* purchasers and holders of these bonds, and are entitled, by reason thereof, to a first mortgage lien therefor upon the Florida Central railroad, so far as any of the bonds held are to be deemed as exchanged for its bonds.

It remains to determine what portion of the bonds raise a lien on the Jacksonville, Pensacola & Mobile railroad, and what portion a lien on the Florida Central. This branch of the subject is invested with some difficulties. I think it is pretty clear, from the evidence in the case, that the first three thousand state bonds were, in fact, issued in exchange for the bonds of the Jacksonville, Pensacola & Mobile railroad company, and that the last one thousand, numbered from three thousand and one to four thousand respectively, were issued in exchange for the Florida Central railroad company's bonds, the latter not being issued until April, 1871, when they were procured by Coddington. It is urged, on the part of the bondholders, that they had no knowledge of this distinction, and ought not to be affected by it. But I am not satisfied that their ignorance on the subject can affect the question. The lien of the bondholders is created by the statute. A resulting equity would have arisen without the aid of the statute, but the statute takes the place of this and regulates the right. The question is not so much what the bondholders ought to have, as what the statute gives them. If they stood on grounds of mere equity, they might not be able to recover more than the amount paid by them for the bonds. I think, however, that the matter is to be governed by the statutes.

After an examination of the statutes of the state bearing upon this point, the court announced its conclusion as follows: That the bondholders cannot claim to have a lien on the Florida Central railroad for any bonds except those whose numbers exceed the number three thousand. Of these, it

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appears, they hold one hundred and ninety-seven. For these bonds, therefore, and the interest due thereon, they are entitled to a first lien on the said railroad, its equipments, franchise and property. For the remaining bonds held by them, whose numbers are three thousand and under, of which they have produced two thousand seven hundred and forty-nine, they will have a lien, as before expressed, on the Jacksonville, Pensacola & Mobile railroad.

This disposes of the most important questions in these causes, and a decree will be made in conformity with this opinion, with such qualifications as may be agreed upon by the trustees of the internal improvement fund and the holders of the old first mortgage bonds of the Pensacola & Georgia and Tallahassee railroad companies on one part, and the holders of the state bonds on the other, as expressed in the memorandum plan which has been referred to, or otherwise. A decree will also be made for a sale of the several railroads for the purpose of raising the amount due to the respective parties according to the respective liens. The bills of the western division of the Western North Carolina railroad company will be dismissed, with costs.

In addition to the questions above disposed of, the counsel for Daniel P. Holland, James G. Gibbes and various other parties, submitted the questions arising upon interventions for their several interests in relation to the fund arising from the property of the Jacksonville, Pensacola & Mobile railroad company.

By the petition of D. P. Holland, it appeared, that on the 2d day of December, 1872, he obtained a judgment in this court against the Jacksonville, Pensacola & Mobile railroad company for the sum of \$62,533.33, issued an execution thereon, and sold the railroad and its appurtenances, and became the purchaser at such sale, and received a deed from the marshal, and took possession of the road. This sale was afterwards adjudged illegal and was set aside. Holland now claims to have the moneys in the hands of the receiver applied to the payment of this judgment, on the ground that said moneys are the property of the company, being produced

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by the earnings of the road, and are not subject to the lien of the complainants, or of the trustees of the internal improvement fund.

BRADLEY, Circuit Justice. This claim cannot be allowed. The money realized by the receivers is a part of the fund as it stood when the receivers were appointed and put in possession. It is as much a part of the mortgaged premises as are the rails or the cross-ties of the road. It is the product and fruits of the property produced since the court took it in hand for the use of the liens and trusts by which it is bound. The property was taken possession of by the court by its receivers, in order to preserve it for the use of those liens and trusts. The fruits arising therefrom whilst thus in custody of the court, do not belong to the Jacksonville, Pensacola & Mobile railroad company in any such sense as to be liable to any other claims than those of the parties for whose protection the road was taken into custody, and such charges as appertain to its management and administration. It would be a strange doctrine to contend, that the Jacksonville, Pensacola & Mobile railroad company itself could appear before the court and demand the money in the receiver's hands. And if the company cannot do this, neither can any party whose claim is based as Holland's is, only upon the company's rights.

The petition urges the statute of January 8, 1853, amending the laws relating to mortgages, which declares that the antiquated claim in favor of the mortgagee to the right of possession of the property specified in the mortgage, by reason of any alleged failure of payment, or breach of promise, or other default, shall in no case be recognized or admitted in a court of justice until all other steps and forms prescribed by law for the foreclosure of mortgages be complied with and observed, and which also declares, that a constructive possession by the mortgagee shall not be allowed to impair the actual, and for ages admitted, right of possession of the mortgagor until deprived thereof by decree, and that the mortgage shall be held a specific lien on the property, and the mortgagee incapable of acquiring possession until after decree of foreclosure.

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This act was evidently intended to abolish the practice which prevailed in England and some of the older states, of allowing the mortgagee to take possession of the mortgaged premises, or to recover the same in ejectment, the moment a default of payment occurred. It cannot apply to prevent the interference of a court of equity in a case where, by the voluntary negligence or misfeasance of the mortgagor, the property is being wasted and consumed so as to peril the security intended by the parties. It cannot apply to prevent such a court from appointing a receiver of a railroad where the railroad company is notoriously insolvent, and is using up and wasting the property. When such a case occurs, as it did in the present case, it is perfectly competent for the court to appoint a receiver to keep and preserve the mortgaged premises, and to enjoin the railroad company from further interfering therewith. And when this is done, it cannot be pretended that the company will be entitled to the receipts of the road whilst in the hands of the receivers, further than to be credited with the amount thereof, after deducting expenses.

Besides, the present is not the case of a mortgage, so far as the trustees of the improvement fund are concerned; but of a lien for purchase money, which the company or its predecessors, for whose acts it is bound, failed to pay. The continued possession of the property without paying the consideration is a *quasi* fraud against the vendor, and the purchaser is a trustee for him, and a court of equity is not restrained by anything contained in the statute from appointing a receiver if there is danger of the property being wasted or deteriorated.

I am of opinion, therefore, that neither the Jacksonville, Pensacola & Mobile railroad company, nor any party claiming under it, as Holland does in this case, can demand the moneys which the receivers have realized from the management of the property, until the liens established by this decree have been satisfied.

The application of the petitioner is denied.

SOUTHERN DISTRICT OF MISSISSIPPI.

NOVEMBER TERM, 1877.

J. REESE COOK v. BENJAMIN D. WHITNEY.

1. To warrant the removal of a cause from a state to a federal court, under the act of March 2, 1867, it is not necessary that the parties should have been citizens of different states at the time the suit was brought, provided they are citizens of different states when the petition for removal is filed.
2. Under said act, the filing in the federal court of an imperfect transcript of the record in the state court, is no ground for remanding the cause.
3. Garnishees are not parties to the suit. The fact that the plaintiff and the garnishees are citizens of the same state, is no obstacle to the removal of a case from the state to the federal court.

Heard upon motion to remand the cause to the state court from which it had been removed.

Messrs. G. N. Simrall and L. W. McGruder, for the motion.

Messrs: G. Gordon Adam and Frederick Speed, contra.

HILL, District Judge. This is an action at law, commenced by attachment, in the circuit court of Warren county, and removed to this court on application of the defendant, under the act of congress of 1867 (14 Stat., 558), providing for the removal of causes, in certain cases, from the state into the circuit courts of the United States.

The questions for decision arise upon plaintiff's motion to remand the cause to the circuit court of Warren county, from which it was removed, into this court.

The motion assigns the following grounds:

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First. Because it does not appear that the defendant was, at the time of the commencement of this suit, a citizen of a different state from that whereof the plaintiff was a citizen at said date.

Second. Because the defendant did not, on the first day of the present term of this court, or at any other time, enter in this court copies of the process against him, and of all pleadings, depositions, testimonies and other proceedings in this cause.

Third. Because this cause is not a suit in which there can be a final termination of the controversy, so far as it concerns the defendant Whitney, without the presence of other defendants to the cause.

These grounds will be considered in the order stated.

Under the judiciary act of 1789 (1 Stat., 73), it was necessary, in order to remove a cause from a state into a federal court, that the non-resident defendant, when sued in a state court of which the plaintiff was a citizen, should have been a citizen of another state at the time the suit was brought. Under this act, it was only a non-resident defendant who could have the cause removed; the plaintiff had no such right.

The act of 1866 (14 Stat., 306) amended the judiciary act of 1789, so far as to allow a non-resident defendant who was sued jointly with a resident defendant in a state court, in certain cases, to remove the cause, as to himself, into the circuit court of the United States, provided a final determination of the cause, so far as it concerned himself, could be had without the presence of his co-defendant, a resident of the state in which the suit was brought. This act gives no right to the plaintiff to have the cause removed.

The act of 1867, known as the prejudice, or local influence act, is the first act which gave the plaintiff the right of removal, but confines it to non-resident plaintiffs, as well as defendants.

The act of 1867 (14 Stat., 558), under which the removal of this cause was made, provides, "That where a suit is now pending, or may hereafter be brought in any state court, in

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which there is a controversy between a citizen of the state in which the suit is brought, and a citizen of another state, such citizen of another state, whether he be plaintiff or defendant, if he shall make and file an affidavit in such state court, that he has reason to believe, and does believe, that from prejudice or local influence, he will not be able to obtain justice in such state court, may have the cause removed to the circuit court of the United States."

This act was passed to prevent injustice to non-resident parties, who might either sue or be sued in state courts, where, from any cause, there might exist prejudice against such non-resident party, in the community where such cause would have to be tried in the state court, and which, as part of the history of that time, was known to exist both North and South, resulting mainly from the war, then just closed. This prejudice might not arise, or be discovered until after the suit was brought, and hence the necessity of allowing the removal as soon as the reason for it should be ascertained after the suit was brought.

There is nothing in the language of the act requiring a different construction, and no contrary ruling has been made by the Supreme Court. Mr. Justice Miller, in the case of *Johnson v. Monell*, 1 Woolworth, 390, holds that, under the act of 1867, the non-residence of the party applying for the removal at the time of the application, is all that is required. This case is referred to, and the same rule recognized by Judge Dillon in his work on the Removal of Causes to the Federal Courts. I concur in these views, and must hold that the non-resident citizenship of the defendant, at the time of making his application for the removal of the cause, is all that was required, and that the first ground stated in the motion for remanding the cause, must be overruled.

The second ground stated in the motion is, that no such record as the law requires was filed in this court within the time prescribed by law, or at any other time. The application for removal was made in the circuit court of Warren county, at last December term. This is a continuation of the November term, 1877, consequently the defendant has until

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the first Monday in May next, the commencement of the next regular term, in which to file the proper record; but, if this were not so, what purports to be a certified transcript of the record was filed in this court on January 29, 1877. If it is not complete, a diminution of the record should be suggested, when proper steps can be had to bring up a complete record. Therefore, this ground stated in the motion for remanding the cause must fail.

The third ground stated in the motion is one of first impression in the courts over which I preside, and, so far as I am informed, in any court.

Two questions are raised:

First, are the garnishees parties to the suit; and, secondly, if parties, can the controversy between plaintiff and defendant be determined by this court, so far as it concerns the defendant, without their presence? After a careful consideration of the question first stated, I am satisfied that the garnishees are not parties defendant to the suit, as between plaintiff and defendant, and have no interest whatever in the controversy between them. The sole issue between the plaintiff and defendant is the question of indebtedness from the defendant to the plaintiff, stated in the pleadings.

It is a matter of no concern to the garnishees which party shall succeed, or to whom they shall pay the money due by them to the defendant. No judgment can be rendered against them until one is rendered against the defendant. If this is never done, the suit is at an end as to them. If, however, a judgment is rendered against the defendant, then their relationship to the defendant is only incidental, as a means of obtaining satisfaction of the judgment. This is done not only without costs as to them, but they are entitled to their costs.

The fact that the plaintiff is a citizen of the same state with them interposes no obstacle to the jurisdiction of the court in enforcing satisfaction of its judgment, out of the amount in their hands belonging to the defendant. If this obstacle existed, judgment creditors would often be deprived of the fruits of their judgment.

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This objection applies with no more force than would be found upon a trial of the right of property, where a judgment was rendered in favor of a resident plaintiff, and levied upon property of the defendant found in the state, and claimed by a citizen of the state. In such case no one, I presume, would question the jurisdiction of the court to try the question as to the rights of the parties. As already indicated, the process of garnishment is but an incident to the suit; the removal of the cause into this court brought with it all its incidents, including the funds belonging to the defendant, or vested in the hands of the garnishees by the process of garnishment, as a means of satisfying plaintiff's judgment, should he obtain one in this court. It is like property which incidentally follows a suit into this court, upon removal from a state court. In such case no question is raised as to the jurisdiction of this court over the property for the purposes of the suit.

I am satisfied that none of the grounds stated for the remanding of the cause are well taken. The result is that the motion must be denied.

THE UNITED STATES v. L. N. DANTZLER.

When property has been seized by a sheriff, by virtue of a writ of replevin issued out of a state court, and released to the defendant upon a forthcoming bond, it is still in the custody of the state court, to abide the result of the replevin suit, and not subject to seizure by the marshal, under a writ of replevin subsequently issued out of a United States court, at the suit of the United States.

In this case a rule was taken upon the United States marshal, requiring him to show cause why he should not discharge from seizure certain logs and lumber taken by him under a writ of replevin sued out of the United States Court, in a suit brought by the United States against the defendant.

Messrs. J. Z. George and T. W. Price, for the rule.

Mr. Luke Lea, United States Attorney, contra.

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HILL, District Judge. The grounds upon which the rule is based are, that before the seizure was made by the marshal, the state of Mississippi had sued out of the circuit court of the county of Jackson, in this state, a writ of replevin against the said defendant, by virtue of which the same logs and lumber were seized by the sheriff, and that under the provisions of the replevin law of the state, the defendant had executed a forthcoming bond, with sureties conditioned for the forthcoming of said property, to abide the judgment of the court in said suit, and that the property was so in his possession, under said bond, at the time of the seizure by the marshal, under the process from this court.

There is no controversy as to the facts stated, the only question being whether or not the property so held by the defendant was subject to seizure by the marshal, under the writ of replevin in his hands, the validity of both replevin writs being admitted. It has been a well settled rule, since the foundation of the federal government, that when property is legally in possession of the officers of the state courts, it will not be disturbed by the officers of the federal courts, and that when legally in possession of the officers of the federal courts, it will not be interfered with by officers of the state courts. Any other rule would lead to conflicts, and mar the much desired harmonious action of our complex system of government.

The important question to be considered is, whether or not the property, after it was released to the defendant upon his forthcoming bond, was still in the custody of the circuit court of Jackson county. The bond is conditioned that the property shall be forthcoming to abide the judgment of the court, if adjudged to belong to the plaintiff, and if default is made therein, to pay its value and the damages sustained by the plaintiff, and costs of suit. Section 1535 of the Code of Mississippi provides that if the property is in possession of the losing party, the execution shall command the sheriff to take the property in controversy, if the same may be had, and deliver the same to the successful party; and, if not to be had, that he make the value thereof, together with the

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damages and costs, of the goods, chattels, lands and tenements of the party, and his sureties against whom the judgment is rendered, or the successful party may have his *distringas* to compel the delivery of the property, together with a *feri facias* for the damages and costs.

There are several adjudicated cases by the Supreme Court of this state recognizing the right of a claimant to personal property to institute his action of replevin, and have the property seized and taken out of the possession of a levying officer under writs of attachment or *feri facias*, though issuing out of different state courts.

But no case is found where it has been taken out of the possession of an officer holding under a writ of replevin. The reason given for permitting the seizure of the property in the possession of an officer holding under a writ of attachment or *feri facias*, is that the officer levying the process is directed to levy only on the defendant's property, and the writ constitutes the officer the judge of what property belongs to the defendant; and if he seizes property belonging to any one else, his process is no protection to him, and he becomes liable, as a wrong-doer, like anyone else. The same doctrine is held by the Supreme Court of the United States, in the case of *Buck v. Colbath*, 3 Wallace, 334. In that case, Mr. Justice Miller, in delivering the opinion of the court, draws very clearly the distinction between the two classes of process, and holds that the officer levying the writ of attachment or *feri facias*, being constituted the judge of what property belongs to the defendant, must act at his own peril, and, if he makes a mistake, must answer for it without the protection of the court from which the process issues; but when he seizes the property specified in his process he is not so liable, and will be protected by the court; he, however, must know that it is specified in the process, for if he makes a mistake and seizes that not specified, he is liable as other persons. In this opinion the case of *Hagan v. Lucas*, 10 Peters, 400, is referred to and approved. In the latter case the facts were substantially these: Hogan obtained judgment against Bynum & McDade, in the federal court for

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Alabama, upon which execution was issued and levied upon certain slaves in the possession of Lucas, as the property of the defendants. Lucas claimed the property, and gave bond for the trial of his right to the property, as provided by the laws of Alabama. Upon the trial of this issue, it was proved that the same slaves had been levied upon by execution issued upon judgments in the circuit court of Montgomery county, Alabama, in favor of different persons, and Lucas claiming them, gave bond as provided by statute, for their delivery to the sheriff to answer the judgment of the court, should the right be decided adversely as to him, upon the trial of the right of property in that court. This case being removed by writ of error to the Supreme Court, the judgment of the court below was affirmed; the court holding that the slaves, when in the possession of Lucas, under his forthcoming bonds, were not liable to seizure by the marshal, and that his levy was void; holding, further, that when seized by the marshal they were still in the custody of the state court; that the possession of Lucas was the possession of the sheriff, and that property in possession of one court cannot be disturbed by an officer, under process, from another court, and especially by one holding his authority from a different source. The same rule is held in *Taylor v. Carryl*, 20 Howard, 583, and in *Freeman v. Howe*, 24 Howard, 450; the rule laid down in *Hagan v. Lucas* being referred to and approved in both cases as the settled doctrine of the Supreme Court on this question. The rule thus laid down by the Supreme Court is binding upon this court, and under it the levy made by the marshal in this case must be held as without authority and void, unless the position taken by the district attorney, and ably and ingeniously pressed, be correct, which is, that admitting the rule as stated, it does not apply to a case where the United States are plaintiffs, in a suit in one of their own courts; that in such case the federal court is not one of concurrent jurisdiction with the state court, but of paramount jurisdiction, and that the United States have a right to resort to their own courts to enforce their rights.

That they do possess this right is uncontroverted, but I

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am of opinion that when the United States bring suit against a citizen for the enforcement of any real or supposed right, they can claim nothing which is not equally the right of the citizen against whom the suit is prosecuted, and that where a state is a party the same rule will be applied.

There is scarcely a conceivable case in which the United States have not ample redress in their own courts for the enforcement of any right, legal or equitable, without interfering with the jurisdiction of the state courts. The writ of replevin, provided by the law of this state, was not in force in this court until recently adopted by rule of this court.

Before then, the United States were only entitled to an action of trover or trespass, and could not have seized this property until after judgment. These actions are still afforded to the United States, and may be prosecuted without any interference with the state court, or its possession of the property in controversy.

If the person holding the property under such bond, or a purchaser under him, is about to remove the same from the jurisdiction of this court, upon bill filed alleging the right of the United States to the property, the pendency of the suit, and the insolvency of the defendant, an injunction will be granted to prevent the removal of the property beyond the jurisdiction of the court.

So soon as the litigation is ended in the state court, the property may be seized if the defendant is successful, or if the plaintiff succeed, it may still be pursued by the writ of replevin, or other remedy. Any risk which the United States may run by reason of not getting immediate possession, would not equal the injury that would result from the conflict of jurisdiction to which the doctrine contended for by the district attorney would lead. For it must be remembered that it would authorize the seizure of the property in the possession of the sheriff, as well as any one else.

It must be admitted that there are cases in which the ends of justice would be promoted by allowing property seized under one writ of replevin to be taken out of the possession of the seizing officer by virtue of another writ of replevin, as

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in case of attachment and *feri facias*, especially as our act of replevin does not allow third parties, claiming the property, to interfere. To enable this to be done, in one or more states it is allowed by statute; but that it requires an enabling statute to permit it to be done, is a strong argument that without it it cannot be done, and none such exists in this state.

A very careful consideration of all the arguments and authorities adduced satisfies me that this seizure was unauthorized and void; therefore, the marshal will release the property and deliver it to the defendant, and it is so ordered.

MARY L. BOURNE ET AL. v. JOSEPH W. MAYBIN, ASSIGNEE

1. In Mississippi a ward is not concluded by the annual accounts of the guardian, filed and passed upon without notice by the probate court, during the infancy of the ward.
2. In that state, upon the filing of his final account by a guardian, his inventory and annual accounts and his whole administration of the trust are subject to challenge and examination.
3. The code of Mississippi, which declares that when a ward arrives at the age of twenty-one or is married, the guardianship shall cease, and the guardian shall deliver up to the ward, or the husband, as the case may require, all the property of the ward in his hands, and on failure to do so, shall be liable to an action on his bond, creates the relation of creditor and debtor between the ward and guardian on the failure of the guardian to comply with the requirements of the statute.
4. The fact that the accounts of a guardian with his ward were in course of settlement in the probate court, does not preclude the ward from proving her claim against the guardian in the probate court.
5. B commenced in a state chancery court a suit against her late guardian, after his adjudication in bankruptcy, for a final settlement of his guardianship, and obtained a decree against him for the amount of the trust estate found in his hands, but the assignee was not a party to the suit: *Held* (a); that the claim of the ward against the bankrupt estate was not merged in the decree of the chancery court, but was a provable claim against the bankrupt estate. (b) And that the assignee was not bound by the amount found by the chancery court, nor would the bankrupt be bound by the allowance of the claim by the bankrupt court.

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6. Suit brought and judgment recovered against a bankrupt on a fiduciary debt which the bankrupt does not discharge, does not preclude the creditor from proving the debt as a claim against the bankrupt estate.
7. The general rule is: that if a father be guardian of his child, he must support the child, if of sufficient ability to do so.
8. But it is within the discretion of the court to allow one who is guardian of his own child compensation for the support of the ward out of the ward's estate.
9. The general rule in equity is, that where land is charged with a burden, every portion of the estate should bear its share of such charge.
10. So, where the incumbrance is on the entire estate and there is a tenant for life, he is bound to keep down the interest, but not to pay any part of the principal.
11. A tenant by the curtesy who happens to be guardian for the remainder man cannot apply his ward's estate to remove the incumbrance from the property in which he holds by the curtesy, and charge his ward with both the principal and interest so paid.
12. The rule of contribution in such cases stated.
13. A guardian who filed neither inventory nor account, but used his ward's estate as if it were his own, is bound to pay interest on the value of the estate, and there is nothing in the Code of Mississippi to relieve him from this obligation.
14. A trustee is bound to keep clear, accurate and distinct accounts—otherwise all presumptions are against him, and all obscurities and doubts are to be taken adversely to him.
15. A trustee who, previous to the late war of the rebellion, appropriated the trust estate to his own use, is liable for interest thereon during the period of the war.

Appeal from decree of the district court, allowing claim of Mary L. Bourne against bankrupt estate.

On December 30, 1868, Joseph W. Maybin was adjudged a bankrupt. On January 24, 1877, the bankrupt estate being still unsettled, Mary L. Bourne, with Joshua W. Bourne, her husband, filed for allowance a claim against the bankrupt estate for the sum of \$30,000. The claim was presented in the form of a petition, which set forth the facts upon which it was based, and prayed that the assignee of the bankrupt might be made a party, and that an account might be stated of the amount due to petitioner from the bankrupt estate. The petition contained the averments required by section 5077, Revised Statutes, for the proof of a demand

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against a bankrupt estate, and was verified by the affidavit of Mary L. Bourne and Joshua W. Bourne, her husband.

The petition was answered by the assignee, who denied any indebtedness from the bankrupt to said Mary L. Bourne, claimed that the accounts between said Mary L. Bourne and the bankrupt had been settled by the probate court of Warren county, Mississippi, and that nothing was due her from the said Joseph W. Maybin, and pleaded the limitation of three, six, and ten years, prescribed by the Code of Mississippi.

Upon the issues thus raised voluminous proofs were taken, and a reference was made to a master, who stated an account, and reported that there was due the said Mary L. Bourne from the said bankrupt estate the sum of \$30,492.95.

Exceptions were filed to the report, which were overruled, and the report was confirmed, and the district court declared and decreed that on the 24th day of January, 1877, the date of the declaration of a dividend to other creditors of said bankrupt estate, there was due to the said Mary L. Bourne from the bankrupt estate of said Joseph W. Maybin the said sum of \$30,492.95, and allowed the same as a proven claim against the said estate.

From this decree the assignee took an appeal to this court.

The claim of Mary L. Bourne against the estate of Maybin arose, as she claimed, from certain property received by Maybin as her guardian.

Maybin was the father of Mrs. Bourne, who, by the death of her mother on February 22, 1851, inherited, as she claimed, a number of slaves and other personal property. On September 26, 1851, Maybin was appointed guardian for his daughter, the said Mary L., and received, as such, her estate.

The law in force at that time (Revised Code of Mississippi of 1857, article 146), required a guardian, "within three months after his appointment, to return to the probate court, under oath, a true and perfect inventory of all the estate, real and personal, and an appraisement thereof and of all money or other things which he may have received, or taken possession of, as the property of his ward." The law also declared, "he

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shall, annually, return an inventory, under oath, of the increase of the estate, if there be any, by the birth of slaves or the increase of other property, and he shall, in like manner, report all losses by death or otherwise."

Article 147 declared: "Such guardian shall, at least once in every year, and oftener if required, exhibit his accounts, showing the receipts and disbursements of money on account of his ward, supported by proper vouchers, in which he shall also show the annual product of the estate under his management, and the sale and disposition of such product. His accounts shall also state his expenditures in maintaining his ward," etc.

Maybin filed no inventory of the property which came into his hands, as required by law, nor did he file any accounts. In August, 1861, he was cited by the probate court to file his inventory and accounts. In response to this citation, he filed an answer, in which he stated that about ten years before he had been appointed guardian of the person and property of his said daughter, that he owned a large estate in his own right, and had but two children, and the property owned by his said ward was but a small portion of what he expected to give her. "Hence your respondent," the answer proceeded, "has never felt that it was necessary to return an inventory of her estate or property, or keep or render any accurate and detailed account of the receipts and disbursements of her property, or for or on her account."

The answer further stated that the ward of the respondent was the owner of the undivided half of certain slaves, naming them, nineteen in number, five of whom had been born since his appointment as guardian, and that these slaves were all the property which had come to the hands of respondent as such guardian.

The answer further stated, that for about six years last past, respondent had employed a private tutor for his ward, at an expense of from \$450 to \$500 per annum, and that in the future the expense of her support and education "would exceed the annual hire of the said half of said negroes."

The answer, thereupon, prayed the appointment of apprais

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ers to make and return an inventory of the property of the ward, and to assess the annual hire thereof during the time it had been in respondent's hands, and that to save respondent the trouble of keeping a detailed account of disbursement for his said ward, her support and education might be set against the hire of her negroes.

In pursuance of the prayer of this answer, the probate court appointed three appraisers, who appraised the hire of twelve negroes, from 1851 to 1861, at \$600 per annum, amounting, in the aggregate, to \$6,000, from which they deducted \$1,000 for expenses of negro children, leaving a balance due, for the hire of the slaves of the ward for the period aforesaid, of \$5,000.

This report was confirmed by the probate court.

Upon the coming in of this report, Maybin filed a statement of his account for the preceding ten years.

The debit side of the account contained but one item for hire of slaves from 1851 to 1861, \$5,000, and the credit side two items, one of \$5,000, amount allowed by probate court for the years 1851 to 1861, inclusive, and amount paid court fees, \$14.50, showing a balance due the guardian of \$14.50.

This account, thus stated, was approved by the probate court.

Maybin never filed any further account. On the 5th day of April, 1866, in response to a citation from the probate court, he filed an answer in which he stated, that the only property of his ward which had at any time come into his hands as guardian, consisted of negroes, and he knew of no other property of his said ward; that as a result of the war, etc., this property had been destroyed; that by an agreement with the probate court in 1861, it was understood that the hire of her slaves should be appropriated to the support and education of his ward; that the hire, after that date, was not sufficient for that purpose, and that he, therefore, had no property or effects of his said ward in his hands.

Upon this answer the probate court declared that "the same is hereby allowed, confirmed and ordered to be recorded,

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and it is further ordered that the said guardian be discharged from further accounting to this court until citation shall issue requiring him to do so."

No citation had ever been issued, and no further account had ever been filed by said guardian.

On the 10th of October, 1867, said ward was married to her present husband, the said Joshua W. Bourne.

The other facts necessary to an understanding of the case are stated in the opinion of the court.

Messrs. G. Gordon Adam and Frederick Speed for petitioner.

Messrs. W. B. Pittman and A. B. Pittman, contra.

WOODS, Circuit Judge. The defense of the statute of limitations set up in the answer cannot prevail. The evidence shows that the petitioner was married to her present husband while an infant. She has, therefore, from her birth been under the disability of either infancy or coverture, either of which suspends the statute of limitation under the Code of Mississippi: Code of 1857, art. 12, sec. 2, chap. lvii, page 400, and Code of 1871, sec. 2156.

Nor is the petitioner concluded by the accounts as they are styled, filed in the probate court by Maybin, as guardian, and the action of the court thereon.

Both were filed during the infancy and before the marriage of the ward, and were passed upon without any notice to her. Neither of them are final accounts, but are expressly stated to be annual accounts.

Such accounts are not conclusive on the ward. The Code of 1857, art. 148, chap. lx, provides for a final account by the guardian after his trust has ceased, either by the marriage or majority of the ward. "And the guardian shall also make a final settlement of his guardianship by making out and presenting to the court, under oath, his final account, which shall contain a distinct statement of all the balances of his annual accounts, either as debits and credits, and also all other disbursements, charges and amounts received and not contained in any previous annual account." The Code then proceeds to

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declare that such account shall be open to the inspection of the ward, and the court shall fix a day for hearing the same, and shall cause notice thereof to be given to the ward to appear and show cause why the final account of the guardian should not be allowed and approved. At the appointed time the court shall proceed to examine the final account and to hear the proofs for and against it, "and if the court shall be satisfied, after full examination, that the account is just and true, it shall make a final decree of approval, ratifying and confirming the guardianship, or it may allow only so much of the account as seems right," etc.

These provisions make it perfectly clear that, on the filing of a final account, the whole administration of the trust and all the annual accounts and the inventories are subject to challenge and examination. The absurdity of binding an infant by an annual or partial account, passed upon by the probate court without notice, finds no place in the jurisprudence of this state, and so the Supreme Court of the state has repeatedly held: *Austin v. Lamar*, 1 Cush. (Miss.), 189; *Harper v. Archer*, 9 Sme. & Mars., 71; *Coffin v. Bramlitt*, 42 Miss., 194.

It is next contended by the defendant that the claim of the petitioner is not of such a nature as to be provable against the bankrupt estate, that only debts, and debts which were in existence at the date of the bankruptcy, can be proven, and that, as between guardian and ward, the relation of debtor and creditor does not exist until there has been a final accounting in the probate court, and a balance found due the ward.

If this proposition were true, then the claim of every ward or other beneficiary of a trust whose guardian or trustee was adjudged a bankrupt before settlement of the trust, would be excluded from participation in the proceeds of the bankrupt estate.

A conclusive answer, however, to this theory of the defense is found in the Code of Mississippi, which declares (Code of 1857, art. 148, chap. lx, page 462) that "the powers and duties of every testamentary or other guardian over the person and

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estate of his ward shall cease and be determined when such ward shall arrive at the age of twenty-one years, or be lawfully married, and in either event the guardian shall forthwith deliver up to the ward or to the husband, as the case may require, all the property of every description of said ward in his hands, and on failure shall be liable to an action on his bond."

Clearly, this provision of the Code raises the relation of debtor and creditor between guardian and his late ward as soon as the guardianship ceases. Mrs. Bourne was married and the powers of the guardian, as such, ceased more than a year before the bankruptcy of the latter, and he was liable to suit in any court of competent jurisdiction for the recovery of the amount which might be due from him to his ward. The relation of debtor and creditor must, therefore, have existed between them as soon as the guardianship was terminated by the marriage of the ward.

Another objection to the proof of the petitioner's claim, similar to the one just considered, is that the debt of the petitioner is not a provable one, because her claim is pending and undetermined in a court, to wit, the probate court, which has full jurisdiction thereof.

We think this objection is fully answered by the case of *Payne v. Hook*, 7 Wallace, 425. In that case, Anne Payne, a citizen of Virginia, filed her bill in the circuit court of the United States against Hook, public administrator of Calloway county, Missouri, and the sureties on his bond, to obtain her distributive share in the estate of her brother Fielding Curtis. The bill charged gross misconduct on the part of the administrator and false settlements with the probate court, and it appeared from the bill that Hook had not yet made his final settlement with the probate court. The bill was demurred to because, among other grounds, the probate court had exclusive jurisdiction concerning the duties and accounts of administrators until final settlement, and the administration complained of was still in progress, and resort should be had to that court to correct the accounts of the administrator, if fraudulent or erroneous.

In reply to this objection to the bill, the Supreme Court

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said: "The circuit court of the United States for the district of Missouri had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it." "The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the Union."

These remarks apply with pertinency to the jurisdiction of the bankrupt court, and to the facts of this case.

The jurisdiction of the bankrupt court depends upon the act of congress. It cannot be controlled or limited by state legislation. It is uniform, and is required by the constitution to be uniform throughout all the states.

Section 711 of the U. S. Revised Statutes declares, "that the jurisdiction vested in the courts of the United States of all matters and proceedings in bankruptcy, shall be exclusive of the courts of the several states," and section 4972, "that the jurisdiction conferred upon the district courts, as courts of bankruptcy, shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy."

Section 5106 declares, "that no creditor whose debt is provable shall be allowed to prosecute to final judgment, any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined,

* * provided, that if the amount due the creditor is in dispute the suit may, by leave of the court in bankruptcy, proceed to judgment for the purpose of ascertaining the amount due."

These citations from the statutes clearly show the jurisdiction of the bankrupt court to ascertain the amount of a claim against the bankrupt estate, and the fact that the claim may be in suit in another court does not divest it of that jurisdiction.

It is true, that the bankrupt court could not arrest a suit brought against the debtor to recover a debt which the bankruptcy would not discharge, but it clearly has the jurisdiction

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to ascertain for itself the amount of the debt, where it is called on to apply towards its payment a part of the assets of the bankrupt estate.

Where a bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate: Revised Statutes, section 5067.

It seems clear, then, that the petitioner had a provable debt against the estate, for immediately on her marriage she might have maintained a suit against her guardian, upon his bond, in any court of competent jurisdiction, to recover whatever might be due her from him, and the fact that the probate court had jurisdiction to ascertain the amount did not oust the jurisdiction of the bankrupt court to do the same thing.

It is next objected to the claim of petitioner, that in November, 1869, she commenced a suit against her late guardian Maybin, in the chancery court of Warren county, Mississippi, for a final settlement of his guardianship, and, on April 22, 1873, obtained a decree against him for \$20,609, and it is claimed that the debt being merged in the decree, neither the decree, nor the original debt on which it was founded, can be proven against the bankrupt estate.

Many authorities are cited to show that the debt or claim on which a judgment is based is merged in the judgment. This is, of course, the general doctrine, and is not disputed.

The rule of merger is that no further action can be prosecuted between the same parties upon a matter already ripened into judgment.

There is no offer in this case to establish the debt by proof of the decree against Maybin, rendered by the state court. The proof offered is evidence to establish the claim upon which that decree was founded. Can this be admitted?

I think it clear that the claim presented against the bankrupt estate is not merged in the decree against the bankrupt. The decree is against the bankrupt, founded on a fiduciary debt which his bankruptcy does not discharge. The claim

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sought to be established in this case, is a claim against the estate of the bankrupt. There can be no merger unless both the bankrupt and the assignee are concluded by the decree of the state court. It is clear that the assignee is not concluded, for he was not a party to the decree. As to him the proceedings and decree of the state court were *res inter alios acta*. When the decree is presented as a claim against the bankrupt estate, he clearly has the right to contest it, and insist that he is not bound by it, and to require the creditor to make good his claim by proof. He can not be bound by a decree to which he was not a party.

So, neither is the bankrupt, in a suit brought against him to recover the amount of a fiduciary debt which is not discharged by the bankruptcy, bound by the allowance of the claim by the bankrupt court. So far as such a debt is concerned, the assignee in no degree represents the bankrupt, and when suit is brought against the latter to establish the claim against him, and to be enforced against his subsequently acquired property, he may well say, I have had no day in court on this claim, and insist on his right to contest. The great majority of claims against a bankrupt estate are not contested; they are allowed upon the *ex parte* proof of the creditor. To say that such an allowance would be binding upon the bankrupt, in a suit brought to recover a fiduciary debt not discharged by the bankruptcy, seems clearly untenable.

The decree in the state court against the bankrupt, and the allowance of the claim for the sum demanded by the bankrupt court, are entirely independent of each other. They are proceedings instituted for different purposes, and against different parties.

The doctrine of merger does not apply. The bankrupt is not bound by the allowance of the claim by the bankrupt court, and the assignee is not bound by the decree of the state court.

It is true that there are authorities of the highest respectability which have held that, if after the institution of proceedings in bankruptcy, judgment is recovered on a provable

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debt, the original debt is merged and extinguished in the judgment, and the judgment is not provable against the estate of the debtor, nor discharged by the certificate: *Bradford v. Rice*, 102 Mass., 472; *Cutter v. Evans*, 115 Mass., 27; *In re Gallison*, 5 B. R., 353; *In re A. S. Mansfield*, 6 B. R., 388; *Holbrook v. Foss*, 27 Me., 441; *Pike v. McDonald*, 32 Me., 418; *Sampson v. Clark*, 2 Oush., 173.

These decisions are placed on the doctrine of merger, which we have seen does not apply here, and because the creditor, by taking judgment and so changing the form of the debt and securing to himself the benefit of conclusive and permanent evidence of it, and an extension of the period of limitation thereon, is held on his part to have elected to look to the debtor personally and to abandon his right to prove against the estate, and the debtor, on the other hand, who might have protected himself by moving the court in which the action was pending for a continuance, in order to afford him an opportunity to obtain and plead a certificate of discharge, is held, by omitting to make such a motion before judgment, to have waived the right to set up his certificate against the plaintiff's claim, and, therefore, the rights of the parties must be governed by the judgment which one has moved for and the other has suffered to be rendered.

It is evident that these reasons do not apply to a claim based on a fiduciary debt which is not discharged by the bankrupt act. The bankrupt law expressly provides (Rev. Stat., sec. 5117) that "no debt created by the bankrupt * * while acting in a fiduciary capacity shall be discharged by proceedings in bankruptcy, but the debt may be proved and the dividend thereon shall be a payment on account of such debt." Here seems to be a clear authority to such a creditor to pursue both remedies, to prove his debt and to prosecute his action against the bankrupt. And in *Lamp Chimney Co. v. Brass and Copper Co.*, 91 U. S., 656, it was held that proof of a debt not barred by the bankruptcy does not preclude an action against the bankrupt thereon, and the converse seems to follow inevitably that suit brought against the bankrupt

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does not preclude proof of such a debt against the bankrupt estate. It cannot, therefore, be said that, by electing to pursue one remedy, he abandons the other, when the law gives him both. Nor can it be said that the debtor, by not interposing his discharge as a defense to the action against him, waives his right to set up his certificate against the plaintiff's claim, for he has no such right, and therefore cannot be said to waive it.

On the other hand, the weight of authority seems to be in favor of the proposition that the taking of judgment by a creditor pending proceedings in bankruptcy, does not prevent the plaintiff in any case from proving his claim: *Clark v. Rowling*, 3 N. Y., 216; *Munroe v. Upton*, 50 N. Y., 593; *Harrington v. McNaughton*, 20 Vt., 293; *Downer v. Rowell*, 26 Vt., 397; *In re Brown*, 3 B. R., 584; *In re Vickery*, 3 B. R., 696; *In re Stevens*, 4 B. R., 367; *In re Rosey*, 8 B. R., 509.

But whichever way the authorities may preponderate on this question, no case can be found which decides that a judgment after bankruptcy, on a debt not barred by the bankruptcy, precludes proof of the claim in the bankrupt court.

My conclusions are, therefore, (1) that the decree rendered against Maybin after his adjudication upon a fiduciary debt which is not barred by the bankruptcy, does not bar the proof of the claim in the bankrupt court; and (2), that the claim of the creditor against the bankrupt estate is not merged in the decree in his favor against the bankrupt; and (3), that as the assignee was not a party to the decree against the bankrupt, he is not concluded by it, and may insist that the creditor shall prove his claim by other evidence than the record of the decree, and as the assignee has insisted on such proof in this case it was properly offered and received.

These conclusions being reached, it only remains to consider whether the report of the master, finding the amount of the claim in favor of the petitioner to be \$30,492.95, should be sustained.

Upon this finding three questions of law arise:

1. Whether Maybin should be credited with any payments

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made by him for the support and education of his ward, she being his daughter; and

2. Maybin being a tenant by the curtesy of certain lands, the fee of which was in his ward, and having made certain payments to discharge a mortgage incumbrance thereon, what credit should he be allowed for such payments in his accounts with his ward.

3. Whether Maybin should have been charged with interest on any balances which might be found in his hands.

Of these three questions in their order:

1. The evidence shows that Maybin, during the greater part of the time while he was guardian for his ward, was a man of large means. The general rule is, that if a father be guardian, he must support his child, if of sufficient ability to do so: Reeves' Domestic Relations, 283. It is, however, within the discretion of the court to allow the father who is guardian a sum out of his ward's estate in payment of his support of the ward.

It appears from the record that the probate court, in 1861, consented to allow Maybin his expenditures in behalf of his ward out of her estate. Although the safe and proper course for the guardian would have been to obtain the consent of the court to this arrangement in advance, yet the court having sanctioned the expenditure after it was made, I am of opinion that Maybin should be allowed all the expenditures in behalf of his ward which the testimony satisfactorily establishes.

Maybin's own testimony on this subject is loose and unsatisfactory. He produces no vouchers and gives no dates. In my judgment, the only money expended for his ward which he proves is a payment of \$500, made to his ward's grandfather in her behalf. This payment is corroborated by the witness Brian, otherwise I should not consider it as satisfactorily proven. I think, therefore, that Maybin should be allowed a credit for \$500, as of the 31st day of December, 1857, the latest date to which the testimony of the witness Brian could apply.

No other payments are shown by Maybin to have been

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made on behalf of the ward, and no other credits ought to be allowed him by reason of alleged expenditures in her behalf.

2. The evidence shows that Maybin was the tenant by the curtesy in a tract of land of which his daughter and ward was seized in fee. At the time Maybin's life estate commenced he was about twenty-three years of age. Within a year or two after the inception of said life estate, Maybin, as reported by the commissioner, paid to relieve said real estate of a mortgage incumbrance left upon it by the ancestor of his ward the sum of \$9,250, to which the commissioner added interest in the sum of \$11,402.95, making the principal and interest \$20,652.95. Half of this sum, to wit, \$10,326.47, the commissioner allowed as a credit to Maybin. His counsel claims that he is entitled to a credit for the whole sum, principal and interest.

It is true that the personal property is the primary fund for the payment of the debts of a decedent's estate, and that in general the heir of a mortgagor or the devisee of his real estate may call upon the executor or administrator to discharge the mortgage on the real out of the personal estate, and this rule is extended to a widow in favor of her dower in an estate mortgaged to secure the purchase money: *Crabb's Real Prop.*, 914; *Cope v. Cope*, 2 Salk., 449; *Brown's Maxims*, 560; *Henagan v. Harllec*, 10 Rich. Eq., 285; *Cumberland v. Coddington*, 3 Johns. Ch., 229.

But the principle is adopted in favor of the heir devisee and doweress alone (*Coote on Mortg.*, 467, 468; *Cope v. Cope*, *supra*; *Torr's Estate*, 2 Rawle, 250; *Mansell's Estate*, 1 Parsons' Eq. Cases, 367), and has no application to the respective rights of the remainder man and tenant for life or for years.

The general rule in equity is, that where land is charged with a burden, each portion of the estate should bear its equal share of such charge: *Stevens v. Cooper*, 1 Johns. Ch., 425; *Story's Eq. Jur.*, sec. 477; *Cheesebrough v. Milard*, 1 Johns. Ch., 409; *Gibson v. Crehore*, 5 Pick., 145.

Where the incumbrance is on the entire estate, and there

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is a tenant for life, he is bound to keep down the interest, but not to pay any part of the principal. If, for example, there is a tenant for life and a remainder man in fee of an estate, subject to a mortgage which is due and must be paid at once to save foreclosure, and the remainder man, to save the estate, pays the mortgage, he is not obliged to take the share of the tenant for life in annual installments of interest, to continue as long as he shall live. He is entitled, as equitable assignee of the mortgagee, to immediate payment, and the sum which he thus has a right to claim is the present worth of an annuity equal to the amount the annual interest would be, computed for the number of years which the tenant will live. This is assumed by the courts to be fixed for this purpose by the tables of longevity. Whatever this sum may amount to is deducted from the gross amount paid for redemption, and the balance is the proportion to be paid by the remainder man. Of course the same rule of computation is applied if the tenant redeems and calls on the remainder man for contribution: 2 Washburne on Real Property, 197; *Swaine v. Perine*, 5 Johns. Ch., 482; *Gibson v. Crehore*, 5 Pick., 145; *Houghton v. Hapgood*, 13 Pick., 154; *Squire v. Compton*, 2 Eq. Cas. Abr., 387; *Foster v. Hiliard*, 1 Story, 77; *Carll v. Butman*, 7 Me., 102, 105; *Jones v. Sherrard*, 2 Dev. & Bat. Eq., 179.

This is the rule applicable to this case. The proposition that a tenant by the curtesy, who happens to be the guardian of the remainder man, can apply his ward's estate to remove an incumbrance from the property in which he holds by the curtesy, and charge his ward with both the principal and interest of the sum so paid, is entirely without foundation, and has no support in any adjudicated case.

Applying the rule above laid down, to ascertain what portion of the \$9,250 paid by Maybin to remove the incumbrance on the land in which he held a life estate he was bound to contribute, and taking his age at the time of payment to be twenty-three years, and computing interest at six per cent, the rate fixed by law in this state, it turns out that Maybin's proportion of the sum paid was \$5,772, and his

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ward's portion \$3,478. For this latter sum, with interest from the date of its payment, Maybin is entitled to a credit. As the commissioner has allowed a sum considerably larger than this, he cannot complain.

3. It is next to be considered whether Maybin was chargeable with interest upon the amounts realized from the estate of his ward.

The general rule on this subject is thus laid down in Perry on Trusts. "If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business, or neglects to settle his account for a long time, he will be liable to pay simple interest at the legal rate:" Vol. 1, sec. 468.

The report of the commissioner shows that Maybin received slaves of his ward, in September, 1851, whose clear yearly hire amounted to \$1,325, and other personal property of the gross value of \$4,350.

Maybin's report, filed in August, 1861, shows that up to that time he had filed neither inventory nor account, but had used his ward's property as if it were his own, and employed it in his own business. Under this state of facts he is clearly liable for interest on the hire of the slaves as it accrued from year to year, and for the interest on the value of the other personal property, unless relieved by the law of this state.

The Code of Mississippi of 1857, pages 461, 462, provides (after requiring the guardian to file annual accounts) as follows: "And for no balance of money in his hands, on such accounts, shall a guardian be charged with interest, but the court may direct him to place the same at interest."

It is perfectly apparent that this provision was not intended to apply to a case like the present. Here the guardian, who is in receipt of a yearly income from the estate of his ward, files neither inventory nor account for ten years, and then makes a grossly false statement of the condition of his ward's estate, giving no detailed account of the assets of his ward, or of his expenditures in her behalf, falsely stating the amount of her property at less than one-half what it really

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was, and giving a palpably false and exaggerated statement of his expenditures in her behalf, thus making it appear that there was nothing due her, when in fact a large sum was due.

Clearly, this is not the case in which the Code intended to relieve the guardian from the liability for interest, and the commissioner was right in charging interest.

It remains to pass upon the correctness of the sum found due from Maybin to his ward by the commissioner.

“A trustee is bound to keep clear, distinct and accurate accounts. If he does not all presumptions are against him, and all obscurities and doubts are to be taken adversely to him:” *Blauvelt v. Ackerman*, 23 N. J. Eq., 495.

“Trustees cannot use trust moneys in their business, nor embark it in any trade or speculation. If a trustee makes such use of the money he will be responsible for all loss, and he may be compelled to pay the highest rate of interest:” *Perry on Trusts*, sec. 464.

Applying these rules to the case in hand, it is impossible to say that the commissioner has reported too large a sum against the guardian. The estimate made by the commissioner, of the amount which should have been received for the hire of slaves, seems to be supported by the testimony which would have justified a much higher valuation. His estimate of the value of the personal property, other than slaves, which come to the hands of the guardian, and was appropriated by him as his own, is also borne out by the evidence. Besides, the commissioner has allowed the guardian \$1,641 more than he should for removing the mortgage incumbrance on the property subject to his life estate, and he has omitted to charge interest against the guardian for the four years of the war. As the guardian had appropriated the trust estate to his own use, and treated it from the beginning of his guardianship as his own, there is no ground for this omission. He is chargeable with interest from the time he appropriates his ward's property until he accounts and pays for it.

I do not go into a minute discussion of the evidence on which the commissioner based his conclusions, because his

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report is presumed to be correct until error is made to appear. This has not been done. Even allowing the guardian a credit for the \$500 which it is shown he paid towards the maintenance and education of his ward, and interest on this sum, the balance found by the commissioner is too small when his mistake in the amount allowed for satisfying the mortgage on the ward's lands, and his failure to charge interest during the war, are taken into consideration. The amount actually due the petitioner is considerably larger than the amount reported. As the sum reported will more than absorb all the assets of the bankrupt estate, the petitioner does not ask for any modification of the decree.

In my judgment, the claim of the petitioner against the bankrupt estate of Maybin, for the amount found due by the district court, is according to law, is sustained by the evidence, and the finding and allowance of the district should be affirmed.

Ordered accordingly.

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ABATEMENT.

See JURIES AND JURORS, 1.

ACTION AT LAW.

Where the act of the legislature of Louisiana, approved February 28, 1852, by authority of which the consolidated bonds of the city of New Orleans were issued, declared that a special tax should be annually levied on real estate and slaves, to raise the sum of \$650,000, to be applied to the payment of the principal and interest of said bonds, the remedy of the bondholders for the enforcement of the contract contained in said act is at law. *Maenhaut v. The City of New Orleans*, 1

ADMIRALTY.

See CHARTER-PARTY, 1, 2. NOVATION, 2.

1. Steamers and other water-craft navigating the Mississippi river have the right to follow the usual channels. *Harroett v. The Natches*, 16
2. It is incumbent on those who have rafts, barges or other craft moored to the banks, to foresee and provide against accidents liable to be caused by the swell of passing steamers. *Ib.*
3. Where a vessel is chartered for a voyage for a round sum, the charterer has the right to load the vessel himself, or allow others to do it under the contract with him. In the latter case, the goods placed on board by third persons, under such contract, are liable only for their own freight, and not for the gross sum named in the charter-party. *Grand v. The Ibis*, 29
4. This rule is not changed by the following clause inserted in the charter-party, viz.: "Bills of lading to be signed when presented, without prejudice to this charter-party." *Ib.*
5. A tug with two tows descending the Mississippi river caused one of her tows to collide with another tug anchored within 500 feet of the bank, at a place where the river was three-fourths of a mile wide. *Held*, that these facts, unexplained, throw the fault on the descending tug. *Oulberg v. The Continental*, 32
6. When a boat is lying at anchor it is not necessary or proper for her to respond to the signals of passing steamers. *Ib.*

7. Where soda, shipped on board an iron steamship at Liverpool for New Orleans, late in the winter, was transported through the Gulf in the warm weather of the early spring, and was damaged by the humidity of the hold, and loss or damage by heat and sweating were among the exceptions of the bill of lading: *Held*, that the case fell within the exceptions, and the ship was not liable. *Mendelsohn v. The Louisiana*, 46
8. Under the local law of Louisiana, claims for materials and supplies furnished a vessel in her home port are a lien on the vessel, if recorded in the proper parish. Without such registry they have no privilege or priority over subsequent mortgages recorded by authority of the act of congress, or claims of later date recorded by authority of the state law. *The John T. Moore*, 61
9. Claims for materials and supplies furnished in the home port, even if duly recorded, are postponed to maritime liens. *Ib.*
10. The registry of a mortgage on a vessel, to be effectual, must be made in the custom-house of her home port. *Ib.*
11. Where the mortgagee of a mortgage on a vessel, which was recorded in the proper custom-house, had notice of a prior unrecorded mortgage, his mortgage was postponed to the unrecorded mortgage. *Ib.*
12. Where A had an unrecorded mortgage on a vessel, and B had a mortgage on the same vessel of later date, duly recorded under the act of congress, but had actual notice of the mortgage of A, and C had a lien by virtue of the registry of his claim under the state law, subsequent in date to the mortgages of both A and B, but C had no notice of the mortgage of A, and the claim of either A or B was sufficient to absorb all the proceeds of the sale of the vessel: *Held*, that said proceeds should be first applied to the mortgage of A. *Ib.*
13. The fact that a mortgage on a vessel has not been acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds, precludes its registry, but does not render it void as against the mortgagor, nor postpone it to the recorded mortgage of a subsequent mortgagee who had notice of such unrecorded mortgage. *Ib.*
14. The wages of a watchman employed on a vessel while lying-up in port are not a maritime lien. *Ib.*
15. There is no maritime lien for the premium due on a policy of insurance taken on a vessel by her owners. *Ib.*
16. Pilotage and towage into port stand in the same rank of maritime liens with necessary supplies and repairs. *Porter v. The Sea Witch*, 75
17. But a claim for towage furnished in one voyage has a lien superior to a claim for supplies furnished on a previous voyage. *Ib.*
18. A steamboat was, upon a dark and stormy night, drifting in a helpless and perilous condition on the Mississippi river, blowing signals of distress, and the lives of all on board were in jeopardy, and the peril was imminent. A steam-tug, on approaching her for the purpose of affording succor to the passengers and crew, collided with and sunk her. *Held*, that the steam-tug was not liable in damages if her attempt at succor was made in good faith, and with reasonable judgment and skill. *Gilman v. The Tyler*, 111

19. In such case the degree of judgment and skill should not be weighed with scrupulous nicety. *Ib.*
20. One of two part owners of a steamboat which is employed in the carrying business for their common profit, can not contract with a shipper to apply the freight earned in carrying his goods to the payment of an individual debt due such shipper from such part owner, without the consent of the other. *Donovan v. Diamond*, 141
21. The part owners may jointly maintain a suit in admiralty to recover the freight, notwithstanding such contract. *Ib.*
22. The allowance or non-allowance of costs in an admiralty cause being a matter within the discretion of the court, is not a subject of appeal. *Taylor v. Woods*, 146
23. The rule adopted in this circuit for the apportionment of salvage is to give one-half to the salving vessel and the other half to her officers and crew, in proportion to their rates of wages. *Sonderburg v. The Tow Boat Company*, 146
24. It is usual also to allow the salving vessel any extra expenses incident to the salvage service which she may have incurred over and above her ordinary outlays. *Ib.*
25. The fact that salvors were engaged but a short time in the salvage service, is entitled to but little weight in fixing the amount of their salvage. *Ib.*
26. Salvage is a reward for meritorious services in saving property in peril on navigable waters, which might otherwise be destroyed, and is allowed as an encouragement to persons engaged in business on such waters, and others, to bestow their utmost endeavors to save vessels and cargoes in peril. *Ib.*
27. Salvage is awarded in such measure, proportioned to the value of the property saved, as to secure the object intended, namely, that seamen and others may have the strongest inducement to face danger and incur personal risk to save that which is in peril of being lost, whether vessel or lives or cargo. *Ib.*
28. As a general rule, it is much better for all parties that the apportionment of salvage among the salvors should be made by the court rather than by the parties themselves. *Ib.*
29. Owners of salving vessels, in making distribution of salvage between themselves and the officers and crew of the vessels, should do so with great caution, and after the fullest explanation of all the facts to the parties interested. *Ib.*
30. If done otherwise, the court will set the distribution aside. *Ib.*
31. When the petty officers and crew of a salving vessel, who have sued her owners for their share of the salvage, did not know the amount of salvage that had been received by the owners until just before the bringing of their suit, delay in bringing the suit could not be set up as a defense. *Ib.*
32. A libel *in personam*, brought by salvors to recover their share of salvage against another salvor who, two years before, had received and still held the money belonging to libelants, could not be defended against on the ground that the claim was stale. *Ib.*

83. A collision took place between two steamboats caused by the fault of both, but the fault of one was greater than that of the other. *Held*, that the court could not gauge the demerit of the boats in assessing the damage to be borne by each. If both were in fault, though in different degrees, the damage should be equally divided between them. *Cannon v. The Potomac*, 158
84. Demurrage forms a fair subject for the allowance of damage in collision cases. *Ib.*
85. Two steamboats had collided with each other by the fault of both, and were adjudged to pay each one-half the damage. One of the boats received insurance money to cover part of her damage. *Held*, that it was not to be deducted from the share which the other steamer was adjudged to pay, even though the underwriters had voluntarily released her from all claim for her fault in causing the collision. *Ib.*
86. In such case the owners of the insured boat were allowed to apply their insurance money to that portion of their loss for which they had no redress against the other boat. *Ib.*
87. It is according to the course and practice of courts of admiralty, where a libellant has obtained a judgment *in personam* against the respondent, to attach a debt due the latter from a third person to satisfy the decree. *Lee v. Thompson*, 167
88. A court of admiralty has power to decide between conflicting claims to property seized by attachment or on execution. *Ib.*
89. Where a party claims property attached by a court of admiralty to satisfy its judgment, and submits its claim to that court, he is bound by its decision. *Ib.*
40. Until the passage of the act of congress, approved February 16, 1875, "to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes," a court of admiralty had strictly no power to try issues of fact by a jury; but it might, either on its own motion or at the instance of the parties, submit any question of fact to commissioners or referees for their opinion and advice. Their decision, however, would not, like the verdict of a jury, be conclusive of the facts, which would finally have to be submitted to the decision of the court. *Ib.*
41. But where, notwithstanding such error, all the evidence is before the appellate court, that court will consider it and render such judgment as the evidence warrants. *Ib.*
42. In a case where the court of admiralty submitted issues of fact to a jury, and the record showed that the court was controlled by the findings of the jury, without consideration of the evidence: *Held*, that the proceeding was irregular and illegal, and if the case were simply one to be affirmed or reversed, it would be reversed. *Ib.*
43. A lien given by the local law of Kentucky upon a steamboat for work and materials furnished in that state for her construction will be postponed by a United States court sitting in Louisiana, to a subsequent mortgage, duly recorded according to the act of congress, in New Orleans, where she was registered and enrolled, and which was her home port at the date of the mortgage and of its registration. *The Underwriters' Wrecking Co. v. The Katie*, 180
44. Where a bark laden with cotton, and anchored outside the bar, took fire, and as the only means of saving ship and cargo she was towed by

salvors into shallow water and filled and sunk, and her hull and cargo were afterwards sold in that condition: *Held*, that the sum which they brought at the sale was the measure of the salvaged property, and that salvage should be allowed on that basis. *Hayden v. The Cochran*, 804

45. The amount allowed in the case to the salvors stated. *Ib.*
46. The part owners of a steamboat are liable for the torts of the master, who is also a part owner, done in the execution of the business in which the boat is engaged. *Taylor v. Brigham & Kelly*, 877
47. A ship was libeled for salvage, and a decree for salvage rendered. The sureties for the claimants, the owners, were compelled to pay the salvage decree. *Held*, that they were not entitled to priority, for the sum so paid, over valid mortgages which antedated the salvage services. *Roberts v. The Huntsville*, 886
48. When a ship is libeled and seized, and released on bond, the libelants can not re-seize her. By her discharge she becomes free, and all anterior liens stand good against her as before her seizure. *Ib.*
49. The lien of a mortgage on a vessel, duly recorded according to section 4192, Revised Statutes, is inferior to all strictly maritime liens, but is superior to any subsequent lien for supplies furnished in the home port, given by state legislation. *Baldwin v. The Bradish Johnson*, 582
50. A state can not, by its legislation, create a lien upon a vessel which shall have priority over one already existing by virtue of an act of congress. *Ib.*
51. A tow which is itself without fault is not liable for damages resulting from a collision caused by the fault of the tug. *Westhoff v. The Oluf*, 667
52. It is no defense to a libel to recover damages resulting from a collision, to say that it was caused by the *vis major*, namely, a hurricane, if the collision could have been avoided by foresight, precaution and nautical skill. *Bodin v. The Thule*, 670

ADMINISTRATORS AND EXECUTORS.

See ESTATE OF DECEASED PERSONS. INTEREST.

ADVERTISEMENT.

See CONTRACTS, 1, 2, 3, 4, 7, 9.

AFFIDAVIT.

See CONSTITUTIONAL LAW, 22, 23.

AFFIDAVIT OF ILLEGALITY.

See STATUTES CONSTRUED, 13.

AGENT AND AGENCY.

1. An agent, unless expressly authorized, can not bind his principal by receiving in satisfaction of a note held by him for collection a greatly depreciated currency which is not a legal tender. *Stoughton & Peck v. Hill*, 404

2. A banking firm in New York was the financial agent of a railroad company, was interested in its capital stock in various classes of its securities and its floating debt. The head of the firm was president of the railroad company, invested with full control of its financial affairs. The company being in a failing condition, and unable to pay the coupons about to fall due on its first mortgage bonds, said banking firm, with the concurrence of the railroad company, in the hope of preserving the credit of the latter, and if its resources should continue to be inadequate to pay the interest on its bonds, with the purpose of instituting proceedings to administer the mortgages property for the protection of the bondholders, agreed to purchase and hold said coupons: *Held*, that there was nothing in the relations between the banking firm and the railroad company which forbade this arrangement. The banking firm was only bound to observe good faith. *Duncan v. The Mobile & Ohio Railroad Co.*, 567
3. Where said banking firm had made a temporary loan to the railroad company, to enable it to pay interest on its maturing coupons, this constituted a confidential debt which the banking company were justified in repaying to itself out of the earnings of the company, the company not objecting. *Ib.*

ALABAMA.

See EQUITY, 12.

ANNEXATION OF TEXAS.

See CONTRACTS, 12, 13.

APPEAL.

See APPEAL BOND.

The allowance or non-allowance of costs in an admiralty cause being a matter within the discretion of the court, is not a subject of appeal. *Taylor v. Woods*, 146

APPEAL BOND.

Penalty of appeal bond in this case fixed at \$100,000, and reasons given therefor. *Duncan & Elliot v. The Mobile & Ohio Railroad Co.*, 597

APPOINTMENT OF CANTU AS GOVERNOR.

1. The document offered in evidence in this case as a link in plaintiff's title, dated at Monclova, March 18, 1835, signed by Jose Benito Camacho Y. Estrada, as deputy secretary, or second clerk, purporting to be an appointment by José Maria Cantu, *ad interim* governor of Coahuila and Texas, of José Maria Balmaceda, as commissioner for the distribution of lands to the colonists of the empresarios McMullen and McGloin, is valid and genuine. *Viesca v. Wyche*, 836
2. The document purports to be an original or protocol, has all the appearance of being such, is authenticated by the seal of the state, and there is no suggestion that it is a forged instrument. *Ib.*

3. The fact that the document is signed by the deputy and not by the principal secretary, is not fatal to its validity. The deputy secretary was considered competent at that time to sign decrees of the government. *Ib.*
4. In this case the principal secretary, José Maria Falcon, was the attorney of Viesca, the grantee of the title, and made the application to the governor for the identical appointment in question; hence there was a propriety in his not signing it. *Ib.*

ATTACHMENT.

See ADMIRALTY, 87, 88, 89.

BANKRUPTCY.

See EXEMPTIONS, 1, 2, 3. JURISDICTION, 9, 10.

1. A bankrupt court should not make an order for the sale of real estate returned by the bankrupt, on the ground that the title is in dispute, when the liens upon the property exceed its value. *In re Ludwigson,* 18
2. Where the title to one undivided half only of certain real estate returned by the bankrupt is in dispute, the bankrupt court is not authorized by section 5063 of the Revised Statutes to order a sale of the entire property.
3. It is doubtful whether the order, in a summary proceeding, of a bankrupt court directing the sale of real estate returned by the bankrupt, on the sole ground that the title thereto is in dispute, can be considered that due process of law to which the party who disputes the bankrupt's ownership is entitled. *Ib.*
4. The individual members of a commercial partnership held, as joint owners, a plantation, which, as such partners, they cultivated in sugar-cane and other crops, and not being indebted individually, they, for the purpose of defrauding the creditors of the firm, executed a mortgage on the plantation to a third person without consideration. *Held,* that this was an act for which the firm might be put in bankruptcy. *Lestrapes & Co. v. Blanc,* 134
5. The bankrupt law does not require the court, in its adjudication of bankruptcy, formally to pass upon the question whether the requisite proportion of creditors, in number and amount of their claims, have joined in the petition. If the defendants desire to contest this point, they should do it in the manner prescribed by the act. *Ib.*
6. Where a married woman was authorized by her husband to carry on business as a partner with other members of a firm, and was separate in property from her husband: *Held,* that it was not necessary to make her husband a party in a proceeding in involuntary bankruptcy against the firm. *Ib.*
7. Suit brought and judgment recovered against a bankrupt on a fiduciary debt which the bankrupt does not discharge, does not preclude the creditor from proving the debt as a claim against the bankrupt estate. *Bourne v. Maybin,* 724

BATTURE.

See MUNICIPAL CORPORATIONS, 6, 7.

BILL OF LADING.

Where soda, shipped on board an iron steamship at Liverpool for New Orleans, late in the winter, was transported through the Gulf in the warm weather of the early spring, and was damaged by the humidity of the hold, and loss or damage by heat and sweating were among the exceptions of the bill of lading: *Held*, that the case fell within the exceptions, and the ship was not liable. *Mendelsohn v. The Louisiana*, 46

BILL OF REVIEW.

See PRACTICE IN EQUITY, 17, 18, 19, 20, 21, 22.

BONA FIDE PURCHASER.

See EQUITY, 24, 27, 28, 29, 30. TRUSTS, 1.

BONDS.

See APPEAL BOND. EQUITY, 8, 29, 30, 31. MUNICIPAL CORPORATIONS, 8, 9, 10, 11, 12, 13. PLEDGER.

1. The act of the legislature of Louisiana, approved February 23, 1853, by authority of which the consolidated bonds of the city of New Orleans were issued, and which declared that a special tax should be annually levied on real estate and slaves, to raise the sum of \$650,000, to be applied to the payment of the principal and interest of said bonds, is a contract with the bondholders, and remains unaffected by any subsequent legislation which seeks to impair or repeal its provisions. *Maenhaut v. The City of New Orleans*, 1
2. Under the provisions of said act, the holders of consolidated bonds are not entitled to priority of payment over other bondholders out of all taxes raised on real estate. *Ib.*
3. The bare fact that the consolidated bonds were older than bonds subsequently issued, gives their holders no advantage over the holders of the bonds of later date. *Ib.*
4. Persons who hold negotiable railroad bonds as collateral security for the payment of debts due them by the railroad company, are *bona fide* holders for value, and are entitled to enforce the payment of the bonds as long as the debts for which they were hypothecated remain unpaid. *Allen v. The Dallas & Wichita Railroad Co.* 316
5. Bonds, payable to bearer, issued by an incorporated company, contained the following provision in relation to the payment of interest, viz.: "With interest at the rate of ten per cent per annum, payable semi-annually on the first days of January and July in each year, on the presentation of the respective coupons hereto attached, both principal and interest payable at the principal office of said company in the city of New York." *Held*, that under this form of bond the coupons might be sued without previous presentation for payment. *Warner v. The Rising Sun Iron Co.*, 514
6. Where the taxing power of the city was limited by the constitution, all the holders of the bonds issued by the city were entitled to share *pro*

rate in the general fund raised by taxation, which remained after the payment of the current expenses of the city. *Sibley v. The City of Mobile*, 535

7. The possession of a negotiable bond is strong *prima facie* evidence of just title, and, in ordinary cases, throws upon the party questioning it the burden to show that the holder had notice of some vice or defect which vitiates his title. *North Carolina Railroad Co. v. Drew*, 691

CANTU.

See APPOINTMENT OF CANTU.

CESTUI QUE TRUST.

See EQUITY, 22, 27, 28, 29.

CHALLENGE.

See JURIES AND JURORS, 2.

CHARITIES.

See DEVISE, 5, 6, 7. WILL, 8, 9, 10.

1. The law of charities is fully adopted in Georgia, as far as is compatible with a free government, where no royal prerogative is exercised. *Jones v. Habersham*, 443
2. Where a charity is definite, the court of chancery will provide a trustee if none is named, or if the one named is incompetent to act. *Ib.*
3. If a devise for a charity can not be carried out in the particular manner contemplated by the testatrix, a court of equity can and will provide proper trustees to carry it out. *Ib.*
4. The state of Georgia has not inadvertently or otherwise deprived itself of the power of creating a charitable corporation. *Ib.*

CHARTER.

See CONSTITUTIONAL LAW, 4, 5, 6, 7, 8, 9, 10. CORPORATIONS, 1, 2. EQUITY, 4, 5, 6. DEVISE, 3.

1. The charter of a railroad company authorized it "to have, purchase, possess, enjoy and retain lands, rents, hereditaments, tenements, goods, chattels and effects of whatsoever kind, nature or quality the same may be, and the same to sell, grant, demise, alien and dispose of." *Held*, that this authorized a purchase by the company of a railroad lying within the limits prescribed by its charter. *Branch Sons & Co. v. The Atlantic & Gulf Railroad Co.*, 481
2. A railroad company whose charter contained the clause set out in the preceding head, and which was also authorized to incorporate its stock with the stock of any other company, had power to sell its railroad to any other company authorized to buy it. *Ib.*

3. Power conferred on a railroad company to sell its road, includes the power to mortgage the same and the franchises necessary to use and enjoy it, not including, however, the franchise of being a corporation. *Ib.*

CHARTER-PARTY.

1. Where a vessel is chartered for a voyage for a round sum, the charterer has the right to load the vessel himself, or allow others to do it under the contract with him. In the latter case, the goods placed on board by third persons, under such contract, are liable only for their own freight, and not for the gross sum named in the charter-party. *Grand v. The Ibis*, 28
2. This rule is not changed by the following clause inserted in the charter-party, viz.: "Bills of lading to be signed when presented without prejudice to this charter-party." *Ib.*

CIVIL RIGHTS.

See CONSTITUTIONAL LAW, 12, 13, 17. JURISDICTION, 1, 2

- The right of resistance to illegal official action is essential, not merely to all free government, but to any government whatever. *United States v. Fears*, 510

CLARK, DANIEL.

See WILL, 4, 5, 8.

COLLISION.

See ADMIRALTY, 6, 83, 84, 85, 86, 51, 52.

COMMERCIAL PAPER.

See BONDS, 4, 5. COUPONS, NOTES AND BILLS.

COMMON CARRIER.

1. A shipper seeking to recover damages of a common carrier for an injury to the thing shipped, must show some injury which can not be the result of its inherent nature or defects, or some carelessness or negligence on the part of the carrier likely to cause the injury, before the burden is cast on the carrier to show that he is not in fault. *Hussey v. The Saragossa*, 380
2. So where a horse, in apparent good health and condition, was shipped on board a steamer, and was delivered at the end of the voyage in a sick and dying condition, but without any fractures, wounds, or any external or visible injury: *Held*, that some negligence or carelessness on the part of the carrier, which would account for the condition in which the horse was delivered, must be shown by the shipper before he could put the carrier in fault, and recover damages for injury to the horse. *Ib.*

CONSIDERATION.

See MARRIAGE SETTLEMENT, 2, 3, 4.

CONSOLIDATED BONDS.

See BONDS, 1, 2, 3. ACTION AT LAW.

CONSPIRACY.

1. An indictment for a conspiracy to do an unlawful act need not aver the means agreed on whereby the conspiracy was to be carried into effect. *The United States v. Dennee*, 47
2. An indictment for conspiracy under section 5440, Revised Statutes, which avers the conspiracy and the overt acts done to carry it into effect, is sufficient without stating the means agreed on to accomplish the purpose of the conspiracy. *Ib.*
3. Section thirty of the act of March 2, 1867, entitled "An act to amend existing laws relating to internal revenue, and for other purposes," which is embodied in the Revised Statutes as section 5440, prohibits a conspiracy to defraud the United States, not only by committing some one or more of the offenses described in other sections of the act, but in any manner whatever. *Ib.*

CONSTITUTIONAL LAW.

See BANKRUPTCY, 3. BONDS, 1. JURISDICTION, 8, 12, 14. REMOVAL OF CAUSES, 18, 20. TAXATION, 5.

1. An act of the legislature of Louisiana abolished the writ of *fiore facias* for the enforcement of judgments against the city of New Orleans, and declared that the effect of the judgment should be limited to fixing the amount of the plaintiffs' demand, and that said judgment should be registered and paid out of any money in the city treasury designated for its payment, and, if none were designated, that the city council might, if they deemed it proper, make an appropriation for its payment. *Held*, that the act was inoperative as to an antecedent debt, because it impaired the obligation of the contract. *The City of New Orleans v. Morris*, 115
2. The law passed by the legislature of Louisiana, March 13, 1877, prescribing the mode of selecting and drawing jurors, is not open to any constitutional objection. *Wells, Ex parte*, 128
3. The settled doctrine in the United States is that the charter of a private corporation is a contract, the obligation of which can not be impaired without an infraction of the constitution of the United States; that a grant of franchise is in point of principle identical with a grant of other property; whether the consideration be large or small is not essential, for the motives or inducements which caused the legislature to pass the act can not be examined to impair its validity. *The State Lottery Co. v. Fitzpatrick*, 222
4. Every valuable privilege given by a charter which conduced to make it acceptable and to promote an organization under it, is placed beyond the power of the legislature, unless the power be reserved at the time the charter is granted. *Ib.*
5. Where a charter conferring the right to draw lotteries has taken the form of an absolute contract, the responsibility of its creation rests with the legislature; the courts must treat it as carrying the obligation which its terms import. *Ib.*

6. A mere license to draw lotteries, which is not inseparable from the essential functions of a corporation, and which has not been acted upon, and under which no rights have been vested, may be repealed by any succeeding legislature of the state by which it is granted. *Ib.*
7. But where such license has been acted on, and under it rights have been vested, it can not be withdrawn by the legislature to the prejudice of those rights. The power of the legislature to recall or modify it is to that extent gone. *Ib.*
8. The grant of a privilege to draw a lottery made to an individual, where no rights have become vested, can be revoked. *Ib.*
9. But where a corporation has been called into existence by a state legislature, for a definite object, declared in the act creating it, and has powers and faculties given to it which are in their nature and operation pertinent to its sole object and necessary to its very existence, its rights and franchises can not be swept away by a repealing act of the legislature of the state which created it. *Ib.*
10. An act of the legislature created a corporation to continue twenty-five years, and then to be dissolved, with a grant of the sole and exclusive privilege of drawing lotteries for the said period, and for the object expressed in the charter, to make of the business a source of revenue to the state, with power to collect capital, issue shares, and to be controlled by directors chosen under the charter, and required the corporation to pay quarterly in advance a specific sum of money to the auditor of state. *Held*, that a charter having these provisions could not be repealed by the legislature. *Ib.*
11. As an unconstitutional law has no inherent force either to authorize or protect, and therefore no claim to be obeyed and no power to divest rights, the agents of its administration, of whatever name or character, may be called to answer, and are individually responsible. *Ib.*
12. Where the officers of a city or state provide public schools of equal excellence for all children between certain ages, but do not allow children of colored parents to attend the same schools with children of white parents: *Held*, that the rights of the former, under the constitution and laws of the United States, are not thereby impaired. *Bertonneau v. The Directors of City Schools*, 177
13. The federal courts have no jurisdiction, irrespective of the citizenship of the parties, of suits respecting violations of a state law or constitution by the officers of a state, which do not impair rights granted or secured by the constitution or laws of the United States. *Ib.*
14. Section two of article one of the constitution of the United States, confers upon the electors in each state, who have the qualifications requisite for electors of the most numerous branch of the state legislature, the right to vote for representatives in congress, and congress has the constitutional power to protect that right. *The United States v. Goldman*, 187
15. Power is conferred on congress, by section four of article one of the constitution, to regulate the time, place and manner of holding elections for representatives in congress. This includes the power to protect the electors in a free interchange of views, in making a free choice, and in expressing that choice freely at the ballot-box. *Ib.*
16. Congress had constitutional power to enact section 5520 of the Revised Statutes. *Ib.*

17. A statute of the state of Texas, passed February 12, 1858, and unrepealed, prohibited a white person from marrying a negro, and for its violation inflicted a penalty upon the white person, but none on the negro. *Held* (1), that the law was still in force, and (2), that it was not in violation of the fourteenth amendment to the constitution of the United States. *Ex parte Francots*, 367
18. An act of the legislature of Georgia gave to persons employed in any steam saw-mill, or who furnished it with saw logs or with anything necessary to carry on the work of the mill, a lien of the highest dignity for the wages of the employés, or for the saw logs and other necessities furnished. *Held*, that it was not within the power of the legislature to make such lien paramount to that of prior judgments and mortgages, or other older liens. *The Townsend Savings Bank v. Epping*, 390
19. Logs which were the property and in possession of persons engaged exclusively in exporting timber from the United States to foreign countries, which had been purchased from citizens of Georgia for the purpose of exportation, were in a port of Georgia and of the United States, awaiting shipment, though not on shipboard, which had been inspected according to the laws of Georgia, and were afterwards exported by the owners, were, while so awaiting shipment and still on land, "exports" within the meaning of section one, article ten, of the constitution of the United States, and as such were protected from imposts or duties or any taxation by the state of Georgia, by whatever name it might be called, except such as was absolutely necessary for the execution of the inspection laws of the state. *Clarke & Co. v. Clarke*, 408
20. The constitution of Georgia, of 1868, which declares that the general assembly shall have no power to grant corporate powers and privileges to private companies, except to banking and other business companies named, but shall prescribe by law the manner in which such powers shall be exercised by the courts, does not take away from the general assembly the power to make amendments to existing charters, nor intend to give that power to the courts. *Jones v. Habersham*, 443
21. An affidavit made solely upon information derived from others whose names are not given, by a person who swears that he has good reason to believe, and does believe, that a certain person, naming him, has committed an offense against the laws, describing it, does not meet the requirements of article four of the amendments to the constitution of the United States. *In the Matter of a Rule of Court*, 502
22. The probable cause mentioned in that article which is to be supported by oath or affirmation, and upon which alone a warrant can issue, must be submitted to the committing magistrate, who must judge of the sufficiency of the ground shown for believing the accused party guilty. *Id*
23. The magistrate, before issuing a warrant, should have before him the oath of the real accuser to the facts on which the charge is based, and on which the belief or suspicion of guilt is founded. *Id*.
24. Section 643, Revised Statutes, in so far as it provides for the removal to the United States circuit court of prosecutions against federal revenue officers in the state courts, is a constitutional enactment. *Hindley v. Satterfield*, 504
25. The legislature of Alabama passed an act creating a harbor board, with authority to contract for the improvement of Mobile harbor,

and requiring the authorities of the county of Mobile to issue to said harbor board the bonds of the county, to an amount not exceeding one million of dollars, to pay for said improvement. The harbor board made a contract for work on the harbor, to be paid for in county bonds. The work was performed by the contractors, and on settlement there was found due to them six county bonds of one thousand dollars each. The act creating the harbor board was repealed, and the board could not demand or receive from the county authorities the bonds to pay this obligation. *Held*, that the rights of the contractors could not be impaired by the repeal of the law creating the harbor board, or any other legislation enacted after the date of their contract. *Kimball & Slaughter v. Mobile*, 555

CONSTRUCTION OF STATUTES.

See STATUTES CONSTRUED.

1. The preamble of a statute is no more than a guide to the intention of the law-maker, and may be resorted to in the construction of the enacting clause, where any controversy exists as to its meaning. *Copeland v. The Memphis & Charleston Railroad Co.*, 651
2. The title of an act has generally but little weight in its construction, but in doubtful cases may be resorted to to explain the general purport of the act. *Ib.*

CONTRACTS.

See FRAUD, 8. USURY, 1, 2.

1. A city ordinance authorized the mayor and chairman of the street committee to contract for grading and paving certain specified sidewalks, but directed them first to advertise for bids for the work. *Held*, that the advertisement calling for bids was a condition precedent to the making of a valid contract. *Hitchcock v. The City of Galveston*, 287
2. Under said ordinance an advertisement for bids, signed by the mayor, but not by the chairman of the street committee, is sufficient. *Ib.*
3. *Bona fide* contractors ought not to be prejudiced by too nice and critical a construction of an advertisement for bids, or because it is vague and general. *Ib.*
4. The advertisement for bids for grading and paving certain sidewalks declared, "All the above work is to be done and executed in accordance with the specifications of the city engineer, now on file in this (the mayor's) office." *Held*, that the fact that there were no such specifications on file, then or at any other time, did not affect the authority of the mayor and chairman of the street committee to make a contract for the work. *Ib.*
5. Where the contract itself required the work to be done according to the specifications on file, and none were on file, but the contract itself specified the materials, and there was a common and well-known process of doing the work: *Held*, that the contract was not void for uncertainty, and the contractors might proceed to do the work in the usual and ordinary way, or refuse to perform the work for want of specifications, and seek damages for the non-fulfillment of the contract in that respect. *Ib.*
6. A contract for filling and grading sidewalks is not void because, at the date of the contract, no grade for the sidewalks was established. *Ib.*

7. A city ordinance authorized the mayor and chairman of the street committee to proceed to have sidewalks constructed in front of the lots of those owners who, for sixty days after notice to do so, failed themselves to construct such sidewalks. *Held*, that without such notice and failure, the officers had no authority to contract for the construction of said sidewalks. *Ib.*
8. Where a contract entered into between the officers of a city and contractors, imposed a more rigid condition on the contractors than was required by the ordinance by which the contract was authorized to be made: *Held*, that this did not avoid the contract; if the contractor consented, the city could not object. *Ib.*
9. The fact that the contract did not conform to the advertisement for bids, did not make it void, provided the contract was within the scope of the ordinance which authorized it. *Ib.*
10. The fact that a contract has been vacated and a new one adopted in its place, is a good defense to an action on the original contract. *Ib.*
11. The colonization contract made by the republic of Texas, acting by Samuel Houston, president, on January 22, 1844, with Charles Fenton Mercer, was valid and binding on the republic. *Hancock v. Walsh*, 351
12. By the terms of the joint resolution of the congress of the United States for the annexation of Texas as a state in the Union, she was allowed, as one of the conditions of annexation, to retain the vacant unappropriated lands within her limits, to be applied to the payment of the debts and liabilities of the republic of Texas. This resolution having been assented to by the convention of Texas, it is not within her power to refuse compliance with its conditions. *Ib.*
13. Whether the resolution of annexation, and its acceptance by Texas, is to be considered as a treaty or a contract, it is equally binding on the state, and she cannot escape from its obligation. *Ib.*
14. By a note of hand, made in Georgia, February 16, 1859, and due January 1, 1860, the payment of a certain number of dollars was promised. *Held*, that the word dollars, as used in the note, meant dollars in lawful money of the United States. *Stoughton & Peck v. Hill*, 404
15. A testator devised a large estate to various legatees to the exclusion of the heir. The heir filed a bill, in which the validity of the will was assailed. Pending this bill, the executor and the heir entered into a contract with each other, to the effect that, in case the will should be set aside, the executor was to pay the heir a certain fixed sum out of the estate, and retain as his own all the residue, to the exclusion of the legatees under the will. *Held*, that such a contract was a flagrant breach of trust by the executor, and was against public policy and void. *Wilson v. Jordan*, 642

CORPORATIONS.

See CHARITIES, 4. CHARTER, 1, 2, 3. CONSTITUTIONAL LAW, 4, 5, 6, 7, 8, 9, 10, 20. MUNICIPAL CORPORATIONS. TRUSTS, 2.

1. Where a corporation has power to hold property, and is forbidden to hold beyond a certain amount, the matter being one of degree merely, it is not a question of *ultra vires*, but of violation of its charter. *Jones v. Habersham*, 443

2. Power to borrow is implied in the creation of all business corporations.
Branch, Sons & Co. v. The Atlantic & Gulf Railroad Co., 481
3. Several states may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into one; and one state may, without thereby creating a new corporation, authorize a corporation of another state to carry on business within its territory *Copeland v. The Memphis & Charleston Railroad Co.*, 651

COSTS.

See APPEAL, 1.

COUPONS.

See BONDS, 5.

1. Possession of uncanceled coupons, detached from negotiable bonds, is *prima facie* evidence of title, with all the rights of purchaser. *Duncan v. The Mobile & Ohio Railroad Co.*, 567
2. There could be no sale of such coupons unless there was an intent on the part of the holder to sell. *Ib.*
3. Coupons severed from negotiable bonds, secured by a mortgage on the property of a railroad company, are not entitled to priority of payment over the principal of the bonds or the coupons subsequently maturing, unless the mortgage contains some provision to that effect. *Ib.*

CRIMES AND OFFENSES.

See CONSPIRACY, 1, 2, 3. SUBORNATION OF PERJURY, 1, 2.

1. It is no offense to resist or obstruct an officer who is acting without authority, or who is exceeding his authority. *United States v. Fears*, 510

DAMAGES.

See ADMIRALTY, 18, 33, 34, 35, 36.

DEED.

See REGISTRY, 1, 2. TRUSTS, 3.

1. According to the Spanish law, as interpreted by the courts of Texas, assisting witnesses are not necessary to the validity of final titles, extended by alcaldes and commissioners to make sales. *Shairburn v. Hunter*, 281
2. The fact that such document is written on unstamped paper is not fatal to its validity. *Ib.*
3. A grant purporting to convey land lying within the limits of a colony will be void if the land in fact lies outside such limits, unless the officer extended the title and the grantee acted in good faith and with reasonable ground to believe that the land was actually situated within the colony. *Ib.*

4. Where a deed in favor of two persons is obtained by the fraud of one, although without the privity of the other, the deed is void as to both. *Wilson v. Prewett*, 681

DEMURRAGE.

See ADMIRALTY, 83, 84.

DEVISE.

See CHARITIES, 2, 3. WILL, 7, 8, 9, 10, 11.

1. Where there is an immediate gift to trustees for a general charity, but the particular application of the fund will not of necessity take effect within any assignable limit of time, and can never take effect at all except on the occurrence of events in their nature contingent and uncertain, the gift is valid, and the court will hold up the fund a reasonable time to await the happening of the contingencies. *Jones v. Habersham*, 448
2. A gift for a library and academy of arts and sciences is for an "educational purpose," and is authorized by section 8157 of the Code of Georgia. *Ib.*
3. A general power was given to the Georgia Historical Society to take and hold goods and lands, with a proviso that the clear annual income should not exceed a stated sum. *Held*, that a devise which increased the income of the society beyond the sum limited, was not void; if the society accepted the trust, it might be cause for forfeiting its charter. *Ib.*
4. The requirement, in the devise, of a building to be used for the purposes of a library, that the name of the testator should be engraved on a marble slab to be placed and kept over the main entrance, does not render the devise void. *Ib.*
5. A devise for the "building and erection and endowment of a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for," is not void for uncertainty as to the beneficiaries of the charity. *Ib.*
6. The devise next above mentioned directed the income and profits of the residuum of the testator's estate should be applied to the erection and endowment of a hospital, and the testator expressed a desire that an act of incorporation should be obtained for the hospital, but no time was fixed for the erection of the building or the obtaining of the charter. *Held*, that the devise was not void for uncertainty in these respects. *Ib.*
7. A devise to trustees for a charitable purpose, which is to be carried on by them until a building, to be erected for the charity, shall be completed, which is then to be handed over by the trustees, with the funds to support it, to a corporation to be created, creates no perpetuity. *Ib.*

DILIGENCE.

See ADMIRALTY, 18, 19.

DOLLARS.

See CONTRACT, 14.

DOMICILE.

A domicile once acquired is presumed to continue. But this presumption does not prevail when its effect would be to impose upon the party the character of an enemy to his government. *Stoughton & Peck v. Hill*, 404

ELECTORS AND ELECTIONS.

See CONSTITUTIONAL LAW, 3, 4, 5. EVIDENCE, 5, 6. HABEAS CORPUS, 3. STATUTES CONSTRUED, 5, 6.

EQUITY.

See CHARITIES, 2, 3. JURISDICTION, 7, 8, 14, 15. MORTGAGE, 3. PRACTICE IN EQUITY, 1, 2, 3, 8, 9, 10, 11, 12, 17, 18, 19, 20, 21, 22, 23.

1. A bill in equity will not lie to restrain an execution issued on a judgment at law upon grounds which might have been urged as a defense to the action at law. *The City of New Orleans v. Morris*, 103
2. The annulment by decree of court of a tax sale of premises mortgaged to secure notes held by different parties, inures to the benefit of all such holders, and not solely of the holder at whose suit the decree was made. *Weaver v. Alter*, 152
3. Where, according to the jurisprudence of Louisiana, property mortgaged to secure several notes has been sold, at the suit of the holder of one of the notes, for a sum insufficient to discharge the entire mortgage debt, and he has been paid his *pro rata* share of the proceeds of sale, the purchaser takes the property subject to the lien of the mortgage which secures the *pro rata* share of the other holders of notes. In such case, the prescription of one of such notes does not inure to the benefit of other holders of notes secured by the mortgage. The *pro rata* share of each note-holder is unaffected thereby. *Ib.*
4. It is the duty of a federal court to interfere to defend the franchises of a corporation from invasion, though disguised in form and to be effected through state officers clothed with statutory power. *The State Lottery Co. v. Fitzpatrick*, 222
5. Generally, courts of equity do not deal with matters of crime, misdemeanors or offenses against prohibitory laws, but they will interfere, by injunction, to stay proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or to make it less valuable for use or occupation. *Ib.*
6. Where a charter, granted by a state legislature, for a definite object, declared in the act creating it, and with powers and faculties given to it which were in their nature and operation pertinent to its sole object and necessary to its very existence, is repealed by the legislature, and the exercises of the rights and franchises conferred by the charter is made a penal offense: *Held*, that the officers of the state charged with the enforcement of the penal laws would be enjoined from arresting or otherwise interfering with the officers and agents of the corporation for acts done by them in the exercise of the rights conferred by said charter. *Ib.*
7. An unreasonable delay in making the motion to vacate the appointment of the receiver will be regarded as an acquiescence in such appointment. *Allen v. Dallas & Wichita Railroad Co.*, 316

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8. Where a contractor for constructing a railroad was entitled, under his contract, to the possession of the road until his contract was completed, and he received from the railroad company a large number of bonds which were secured by a trust deed on the road, which authorized the trustees to take possession of the road upon default in the payment of the interest on the bonds, and the contractor transferred the bonds for value: *Held*, that this right to the possession of the road, under his contract with the company, was subordinate to the right of the trustees to the possession upon default in the payment of interest on the bonds. *Ib.*
 9. Where the complainants in a bill in equity to recover lands of which the defendants were in possession, claimed only an equitable title thereto, and did not set up any facts tending to show that the defendants were in any way affected by their equity: *Held*, that the bill could not be maintained. *Young v. Porter*, 842
 10. The bare fact that parties who hold an equitable title to land can not sue at law, does not give a court of equity jurisdiction. *Ib.*
 11. The remedy of parties so situated is first to obtain the legal title, and then bring their action at law against the parties in possession of their land. *Ib.*
 12. The legislature of Alabama passed an act creating a harbor board, with authority to contract for the improvement of Mobile harbor, and requiring the authorities of the county of Mobile to issue to said harbor board the bonds of the county, to an amount not exceeding one million dollars, to pay for said improvement. The harbor board made a contract for work on the harbor, to be paid for in county bonds. The work was performed by the contractors, and on settlement there was found due to them six county bonds of one thousand dollars each. The act creating the harbor board was repealed, and the board could not demand or receive from the county authorities the bonds to pay this obligation. *Held*, that the bill in equity of the contractors, against the county, to compel the delivery directly to them of the bonds, was well brought, and a court of equity had jurisdiction of the case. *Kimball & Slaughter v. Mobile*, 555
 13. In the administration, by a court of equity, of a common fund subjected to the equal benefit of many creditors, if one creditor objects to the claim of another, and succeeds in showing it to be invalid, such claim does not stand good as against other creditors who interpose no objection to it. The opposition of one inures to the benefit of all. *Duncan v. The Mobile & Ohio Railroad Co.*, 567
 14. If other creditors expressly waive all objection to such claim, and consent that it shall participate in the fund, such waiver and consent can only affect the proportion of the fund to which they would be entitled if the disputed claim were excluded. *Ib.*
 15. A banking firm in New York was the financial agent of a railroad company, was interested in its capital stock in various classes of its securities and its floating debt. The head of the firm was president of the railroad company, invested with full control of its financial affairs. The company being in a failing condition, and unable to pay the coupons about to fall due on its first mortgage bonds, said banking firm, with the concurrence of the railroad company, in the hope of preserving the credit of the latter, and, if its resources should continue to be inadequate to pay the interest on its bonds, with the purpose of instituting proceedings to administer the mortgage property for the protection of the bondholders, agreed to purchase and hold said coupons. *Held*, that there was nothing in the relations between

- the banking firm and the railroad company, which forbade this arrangement. The banking firm was only bound to observe good faith. *Ib.*
16. Where said banking firm had made a temporary loan to the railroad company, to enable it to pay interest on its maturing coupons, this constituted a confidential debt which the banking company were justified in repaying to itself out of the earnings of the company, the company not objecting. *Ib.*
 17. A railroad company pledged its earnings for advances obtained by its president to pay its semi-annual interest. *Held*, that this pledge of the earnings was made for the security of the president, and did not prevent him from paying other debts with such earnings, if he found it expedient and for the company's interest to do so. *Ib.*
 18. When a common fund is equally liable as a security for various claims, it can only be administered for the benefit of all, and this whether the claims have matured or not. *Ib.*
 19. If bondholders secured by a mortgage on a railroad, purchase the entire property at a foreclosure sale, they have an equitable right, after satisfying the costs and charges of the litigation and trust, to pay the residue of their bid in bonds, so far as to cover their own proportion of such residue. *Duncan & Elliott v. The Mobile & Ohio Railroad Co.*, 597
 20. The granting of a preliminary injunction is within the discretion of the court, and in the exercise of this discretion it will look at the consequences which will ensue, on the one hand, from granting it, and, on the other hand, from withholding it. *The North Carolina Railroad Co. v. Drew*, 674
 21. Upon a bill filed to restrain a sale of mortgaged property by a trustee, on the ground that the bonds to pay which the sale was to be made were void: *Held*, that the possibility that a favorable chance to sell the property would be lost by delay, was not a legal ground for refusing to restrain the sale, which would entirely destroy the rights of complainant, if he had any. *Ib.*
 22. The real owner of the majority of stock in a railroad company who permits its affairs to be managed by others holding the legal title to the stock, and the officers elected by them, can not claim as against innocent parties, that the company is exempted from any obligation which it has assumed through such officers and managers, or to which it may, through them, have become equitably liable. *Ib.*
 23. The trustee, with power of sale, for certain parties holding bonds secured by a lien upon a railroad, has the right to decide, in the first instance, upon the sufficiency of the claim of the bondholders to have the property sold to pay the bonds which they profess to hold; at the same time, those representing the railroad company have the concurrent right of appealing to the courts for an adjudication upon the claims and rights of the alleged bondholders. *Ib.*
 24. When the evidence upon a motion for injunction raised grave doubts on the question, whether the bondholders in whose behalf the trustee was about to make a sale, were *bona fide* holders, an injunction to restrain the sale was allowed. *Ib.*
 25. Certain parties purchased a railroad and received a deed therefor, but left a part of the purchase price unpaid, and then procured an act of the legislature, by which they, as purchasers and owners, were incor-

porated. *Held*, that the company so formed took the railroad, subject to the vendor's lien for the unpaid purchase money. *North Carolina Railroad Co. v. Drew*, 691

26. The consolidation of said company with another did not discharge said lien. The notice of the lien with which the first company was charged affected also the consolidated company. *Ib.*
27. Where trust funds were fraudulently used by a trustee to purchase stock in a railroad company, and said company was afterwards, in pursuance of authority granted by the legislature, consolidated with another company: *Held*, that the beneficial owner of the trust funds, having knowledge of the misappropriation, and suffering the trustee to retain possession of the stock in the new company, must seek the enforcement of his equities arising from such misappropriation against the stock in the consolidated company, held by the unfaithful trustee. *Ib.*
28. Where such beneficial owner promoted and acquiesced in the issue and sale of bonds by the new consolidated company, it could not except to the *bona fides* of the issue and sale, and the holders of the bonds so issued had a better equity as against the property of the railroad company than such beneficial holder. *Ib.*
29. A railroad company issued its bonds, which, by virtue of an act of the legislature, the officers of the state received in exchange for an equal amount of state bonds. The same act created a statutory mortgage in favor of the state, to secure the payment of the bonds of the railroad company, for which the state bonds were exchanged. It was decided by the Supreme Court of the state, that said state bonds were issued without constitutional authority, and the state was not bound thereby. *Held*, that under these circumstances the holders of the state bonds, given in exchange for the railroad bonds, had a right to enforce, for their own benefit, the said statutory mortgage in favor of the state. *Ib.*
30. The fact that the bonds of the railroad company were issued and exchanged for state bonds, in order that the stockholders of the railroad company might use the proceeds of the state bonds for their own private advantage, and they were so used, and not for the purposes contemplated by the statute which authorized the exchange, is no defense against the railroad bonds in the hands of a *bona fide* holder. *Ib.*
31. Where the lien of bondholders on railroad property is created by statute, the statute regulates their rights, notwithstanding the fact that without its aid a resulting equity would have arisen in their favor. *Ib.*
32. Where, at the instance of bondholders secured by a mortgage lien upon a railroad, a receiver has been appointed to take possession of and preserve the railroad and conduct its business, the proceeds and profits of the business in the hands of the receiver are subject to the charges of administration and management and the liens and trust in behalf of which the receiver was appointed. Neither the railroad company itself nor any party whose claim is based on the company's rights, can demand any of the income in the receiver's hands until the prior liens have been satisfied. *Ib.*
33. The general rule in equity is, that where land is charged with a burden, every portion of the estate should bear its share of such charge. *Bourne v. Maybin*, 724

84. So, where the incumbrance is on the entire estate, and there is a tenant for life, he is bound to keep down the interest, but not to pay any part of the principal. *Ib.*
85. A tenant by the curtesy, who happens to be guardian for the remainder man, can not apply his ward's estate to remove the incumbrance from the property in which he holds by the curtesy, and charge his ward with both the principal and interest so paid. *Ib.*
86. The rule of contribution in such cases stated. *Ib.*

ERASURE OF MORTGAGE

See MORTGAGE, 1, 2.

ESTATE OF DECEASED PERSONS.

1. A court of probate can not authorize an administrator to take possession of any property of which the title or right of possession is not in the estate of the intestate. *The Crescent City Ice Co. v. Stafford*, 94
2. The title of property belonging to the estate of a decedent vested in an administrator appointed by the court of the domicile of the decedent, is not divested by the transportation of the property to another state, to be sold in its markets. *Ib.*
3. An administrator appointed in such other state is not entitled to the possession of such property so transported thereto for sale. *Ib.*

ESTOPPEL.

See REMOVAL OF CAUSES, 29.

EVIDENCE.

See COMMON CARRIER, 2. HABEAS CORPUS, 3. PRACTICE IN EQUITY, 24, 25, 26.

1. Evidence which is incompetent for one purpose, but competent for another, is admissible, subject to proper instructions from the court. *Lestraps & Co. v. Blanc*, 134
2. The deposition of a defendant taken in another cause, is admissible either to contradict his oral evidence given on the trial, or as an admission by him. *Ib.*
3. A document shown to be a genuine original act of the government, is proper evidence of the appointment or decree which it embodies. *Viesca v. Wyche*, 336
4. The proper depository for such a document is among the archives of the state. But its absence therefrom is not fatal to its authenticity, but may be explained. *Ib.*
5. When poll-books, ballots and other papers relating to an election have, by virtue of the process of a court of the United States, come into its possession, where they are retained to be used as evidence in prosecutions pending in that court, they can not be taken from its custody by the order of a state court, on the ground that the law of the state places them in the keeping of the inspector of elections. *Ex parte Turner*, 608

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6. Both the state and federal courts have the power to require the production of ballots, poll-books and other papers relating to an election, when they are necessary and proper evidence in prosecutions for offenses of which those courts respectively have jurisdiction, notwithstanding the fact that the state law places their custody with the election inspector. *Ib.*
 7. To ascertain the purpose of the grantor in a marriage settlement, evidence of fraudulent transfers by him to other persons at or about the time of the settlement, is admissible. *Wilson v. Prewett*, 681
 8. The possession of a negotiable bond is strong *prima facie* evidence of just title, and, in ordinary cases, throws upon the party questioning it the burden to show that the holder had notice of some vice or defect which vitiates his title. *North Carolina Railroad Co. v. Drew*, 691

EXAMINERS.

See PRACTICE IN EQUITY, 25.

EXCEPTION.

See PRACTICE AT LAW, 1, 2, 3, 4, 5.

EXECUTION.

See CONSTITUTIONAL LAW, 1. EQUITY, 1. MUNICIPAL CORPORATIONS, 1, 2, 3. STATUTES CONSTRUED, 13.

1. In Georgia a writ of *fiери facias* for taxes is subject to the same rules as to its mode of execution as writs issued in judgments in favor of private parties. *Georgia v. The Atlantic & Gulf Railroad Co.*, 434
2. A railroad can not be cut up into parcels and sold piece-meal on execution. *Ib.*

EXECUTORS AND ADMINISTRATORS.

See ESTATE OF DECEASED PERSONS, 1, 2, 3. INTEREST.

EXEMPTIONS.

1. Where no property is claimed by a bankrupt under the specific exemptions of the bankrupt act, his claim for an allowance must stand upon the exemption granted by the laws of the state. *In re Friend*, 388
2. Under the law of Georgia, which exempts personal property of the value of one thousand dollars in specie, the bankrupt is not entitled to money, the proceeds of articles sold by the assignee. *Ib.*
3. In this case the bankrupt set apart and claimed certain specific goods as exempt. The assignee took no notice of the claim, but mixed the goods claimed with others, and sold all indiscriminately, and afterwards allotted to the bankrupt, out of the proceeds, one thousand dollars. *Held*, that the assignee mistook the law. All the bankrupt was entitled to was the proceeds of the specific goods claimed and set apart by him. *Ib.*

4. An unmarried man who lives (but does not keep house) in one town, and supports, by his contributions, his mother and his unmarried sister, who board with his married sister in another town, is not entitled to the exemptions allowed by the law of Georgia to the head of a family. *Jones v. Gray*, 494

FINAL TITLE.

See DEED, 1, 2.

FRANCISE.

See CHARTER, 8. EQUITY, 4.

FRAUD.

See MARRIAGE SETTLEMENT, 9, 10. PRACTICE AT LAW, 6, 7.

1. Fraud practiced in the recovery of a judgment can not be pleaded in an action on the judgment, prosecuted in another state, unless such defense could be made in the courts of the state where the judgment was rendered. *Barras v. Bidwell*, 5
2. An agent or officer may have authority to make a contract, and yet be guilty of fraudulent collusion with the other party in making it. The terms of the contract, and all the circumstances of its negotiation and execution, and the conduct of the parties before and afterwards, may be examined for the purpose of proving such fraud. *Hitchcock v. The City of Galveston*, 287
3. The fact that the profits to be derived from a contract are very large, is no reason why they should not be recovered. Where the profits are unreasonable and unconscionable, that fact may be an indication of fraud in procuring the contract. But where the contract is established against all charges of fraud or other assaults on its validity, it is entitled to all the legal consequences and incidents of a valid contract. *Ib.*
4. To make an ante-nuptial settlement void as a fraud on creditors, both parties to the settlement should concur in, or have notice of the intended fraud. *Wilson v. Prewett*, 631
5. A marriage settlement can not be made a cover for fraud. If the purpose is to delay or defraud creditors, and both parties are cognizant of it, the consideration of marriage will not support the settlement. *Ib.*
6. If the amount of property settled is extravagant, or grossly out of proportion to the station or circumstances of the husband, and he is embarrassed by debt, and the other party knows it, this, of itself, is sufficient notice of fraud. *Ib.*
7. P. was indebted in the sum of about \$90,000, and owned property worth about \$50,000. In alleged consideration of marriage, he conveyed to his prospective wife property of the value of \$82,776, and in addition thereto, he conveyed to her other property of the value of \$13,300, to be held by her in trust for two favored creditors. This conveyance included all his property, except three thousand six hundred and eighty acres of land, worth two dollars per acre, which was covered by a deed of earlier date which had never been canceled. The deed of marriage settlement left \$70,000 of debts unprovided for.

The prospective wife knew, before the marriage, and before the execution of the marriage settlement, that P. was embarrassed by his debts, and for that reason had demanded an ante-nuptial settlement before she would consent to marry him. *Held*, that the deed of settlement was in fraud of creditors and void. *Ib.*

8. Where a deed in favor of two persons is obtained by the fraud of one, although without the privity of the other, the deed is void as to both. *Ib.*
9. J., who was insolvent, conveyed to his wife real and personal property of the value of \$7,700, for a consideration estimated at \$1,587. *Held*, that the consideration was so grossly inadequate as, under the circumstances, to establish conclusively the fraudulent character of the conveyance. *Wilson v. Jordan*, 642
10. A testator devised a large estate to various legatees, to the exclusion of the heir. The heir filed a bill, in which the validity of the will was assailed. Pending this bill, the executor and the heir entered into a contract with each other, to the effect that, in case the will should be set aside, the executor was to pay the heir a certain fixed sum out of the estate, and retain as his own all the residue, to the exclusion of the legatees under the will. *Held*, that such a contract was a flagrant breach of trust by the executor, and was against public policy and void. *Ib.*

GAINES, MYRA CLARK.

See WILL, 5.

GARNISHEES.

See REMOVAL OF CAUSES, 43.

GEORGIA.

See CHARITIES, 1, 4. CONSTITUTIONAL LAW, 20. EXEMPTIONS, 4. EXECUTION, 1.

GRANT.

See DEED, 1, 2, 8.

GUARDIAN AND WARD.

See TRUSTEE, 8, 4.

1. In Mississippi a ward is not concluded by the annual accounts of the guardian, filed and passed upon without notice by the probate court, during the infancy of the ward. *Bourne v. Maybin*, 724
2. In that state, upon the filing of his final account by a guardian, his inventory and annual accounts, and his whole administration of the trust, are subject to challenge and examination. *Ib.*
3. The Code of Mississippi, which declares that when a ward arrives at the age of twenty-one or is married, the guardianship shall cease, and the guardian shall deliver up to the ward, or the husband, as the case may require, all the property of the ward in his hands, and on failure to do so, shall be liable to an action on his bond, creates the

relation of creditor and debtor between the ward and guardian on the failure of the guardian to comply with the requirements of the statute. *Ib.*

4. The fact that the accounts of a guardian with his ward were in course of settlement in the probate court, does not preclude the ward from proving her claim against the guardian in the probate court. *Ib.*
5. The general rule is, that if a father be guardian of his child, he must support the child, if of sufficient ability to do so. *Ib.*
6. But it is within the discretion of the court to allow one who is guardian of his own child compensation for the support of the ward out of the ward's estate. *Ib.*
7. A guardian who filed neither inventory nor account, but used his ward's estate as if it were his own, is bound to pay interest on the value of the estate, and there is nothing in the Code of Mississippi to relieve him from this obligation. *Ib.*
8. A tenant by the curtesy, who happens to be guardian for the remainder man, can not apply his ward's estate to remove the incumbrance from the property in which he holds by the curtesy, and charge his ward with both the principal and interest so paid. *Ib.*

HABEAS CORPUS.

1. When a person is in custody for an act done or omitted, in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof, he is entitled to be discharged on *habeas corpus*, no matter by what authority he is restrained of his liberty, nor how regular and formal the proceedings against him may be. *Ex parte Turner*. 603
2. The fact that he is in custody, by virtue of the judgment of a state court, for contempt, forms no exception to this rule. *Ib.*
3. The court which first obtains, by its process, possession of papers and documents which are proper evidence in a prosecution pending in such court, has the right to retain them until they have been used in evidence, and no other court of concurrent jurisdiction can, without its leave, take them from its custody, or require its officers to produce them before its grand jury. *Ib.*
4. Officers of a court of the United States, who are arrested by a state court for contempt, in refusing to obey such a requirement, are entitled to be discharged on *habeas corpus*. *Ib.*

HOMESTEAD.

See JURISDICTION, 9, 10. PRACTICE IN EQUITY, 11, 12.

HUSBAND AND WIFE.

See MARRIAGE SETTLEMENT, 1, 2.

ILLEGALITY.

See AFFIDAVIT OF ILLEGALITY.

INCUMBRANCES.

See EQUITY, 83, 84, 85.

INDICTMENT.

See JURISDICTION, 5.

1. An indictment for subornation of perjury must aver that the defendant knew that the testimony which he instigated the suborned witness to give was false, and that in giving such testimony the witness would willfully and corruptly commit the crime of perjury. *The United States v. Dennee*, 39
2. An indictment for a conspiracy to do an unlawful act need not aver the means agreed on whereby the conspiracy was to be carried into effect. *The United States v. Dennee et al.* 47
3. An indictment for conspiracy under section 5440, Revised Statutes, which avers the conspiracy and the overt acts done to carry it into effect, is sufficient, without stating the means agreed on to accomplish the purpose of the conspiracy. *Ib.*
4. An indictment based on section 5520 of the United States Revised Statutes for conspiracy to prevent by force, etc., a citizen lawfully authorized to vote from giving his support and advocacy in a legal manner in favor of the election of a lawfully qualified person as a member of congress, need not set out the acts of advocacy and support which the conspiracy was formed to prevent. *United States v. Goldman*, 187
5. An indictment, under section 3177, for hindering an internal revenue officer, without warrant, from entering a building where illicit distilled spirits, subject to tax, were kept, and from seizing said spirits, must aver that the attempt of the officer to enter, which was hindered, was made in the day time, or that it was made in the night season when the premises were open, and that such entry was necessary for the purpose of examining such distilled spirits, and that they were in the custody of some person who had the purpose of selling or removing the same, in fraud of the internal revenue laws, or the design to avoid the payment of the taxes thereon. *United States v. Fears*, 510

INJUNCTION.

See EQUITY, 4, 5, 6, 20, 21, 24. PRACTICE IN EQUITY, 4.

INSURANCE.

See ADMIRALTY, 35, 36. LIEN, 1, 8

Certain creditors of G., at his instance and cost, took out in their own name and for their own benefit, insurance on his gin house, etc., to secure their debt in case of loss of the gin house by fire. The property insured was burned. *Held*, that a creditor of G., who held a mortgage on the same property, and who, by its terms, was entitled to have the same insured for his benefit at the cost of G., had no claim on the insurance money, even though the parties who took out the insurance had no insurable interest in the property insured. *Wheeler v. The Insurance Company*, 43

INTEREST.

1. An executor is not discharged from the payment of interest on a principal sum found due from him by the probate court, by showing that he invested the money in confederate bonds and received no interest, if the investment was made under such circumstances as did not relieve him from the payment of the principal. *Lockhart v. Horn*, 542
2. A trustee who, previous to the late war of the rebellion, appropriated the trust estate to his own use, is liable for interest thereon during the period of the war. *Bourne v. Maybin*, 724

JUDGMENT.

See LIEN, 7.

JUDGMENT CREDITOR.

See TRUSTS, 1.

JURIES AND JURORS.

See ADMIRALTY, 40. STATUTES CONSTRUED, 6, 7.

1. Defendants who have not had any earlier chance to object to the composition of the grand jury by which they have been indicted, may do so by plea in abatement. *The United States v. Reeves*, 199
2. Upon the trial of a case, removed under section 643 of the Revised Statutes, the right of the parties to challenge jurors is regulated by the law of the United States. *Georgia v. O'Grady*, 496

JURISDICTION.

See EQUITY, 5, 9, 10, 11. MORTGAGE, 1, 2. REMOVAL OF CAUSES, 16, 17.
STATUTES CONSTRUED, 1.

1. The jurisdiction of the United States circuit courts, under section 2010 Revised Statutes, is limited to those actions in which the sole question touching the title to office arises out of the denial to citizens of the right to vote on account of their race, color or previous condition of servitude. *Johnson v. Jumel*, 69
2. That section gives no jurisdiction over a case brought to enable a party physically to regain an office to which he had a title established by the election, into which he had been inducted, but from which he had subsequently been ejected. *Ib.*
3. A court of probate can not authorize an administrator to take possession of any property of which the title or right of possession is not in the estate of the intestate. *The Crescent City Ice Co. v. Stafford*, 94
4. The federal courts have no jurisdiction, irrespective of the citizenship of the parties, of suits respecting violations of a state law or constitution by the officers of a state, which do not impair rights granted or secured by the constitution or laws of the United States. *Bertonneau v. The Directors of City Schools*, 177
5. The jurisdiction of a court of the United States to try persons accused of conspiracy under said section, is not ousted by the fact that the

indictment charges that in carrying out their design the conspirators were guilty of a crime of which the state courts had exclusive jurisdiction, even though such crime were of higher grade than the conspiracy charged. *The United States v. Goldman*, 187

6. The act of congress, approved March 3, 1875. "To determine the jurisdiction of circuit courts of the United States, and for the removal of causes from state courts, and for other purposes," enlarges the jurisdiction of the circuit courts to the full limits authorized by the constitution. *The State Lottery Co. v. Fitzpatrick*, 222
7. A bill in equity which alleged that a state had, by legislative act, chartered a lottery company with the right to exercise its functions for twenty-five years, the lottery company to pay to the state the sum of \$40,000 annually, and had passed a subsequent act repealing the charter of the company, and making it a penal offense to carry on the business authorized by the charter, and which charged that said repealing act impaired the obligation of the contract between the state and the lottery company, disclosed a case arising under the constitution of the United States, of which the circuit court had jurisdiction, irrespective of the citizenship of the parties. *Ib.*
8. A bill filed against the commissioner of the general land office of Texas, to restrain him from allowing locations of land within the limits of a grant made to a party under whom complainant claimed, and which was afterwards confirmed by the state of Texas, is not a suit against the state. *Hancock v. Walsh*, 351
9. The homestead secured to the head of a family by the state law is excepted by section fourteen of the bankrupt act (Revised Statutes, section 5045) from the operation of the conveyances made to the assignee, and is not subject to the jurisdiction of the bankrupt court, but must be pursued by those having claims against it in the proper state tribunals. *In re Buss*, 382
10. The fact that the bankrupt has in a particular case waived his right to the exemption, or that the homestead was not ascertained and set out in severalty before the proceedings in bankruptcy were begun, does not change the rule. *Ib.*
11. Whenever the controversy in a suit is between citizens of different states, it is within the judicial power of the United States, though there are other persons in the case citizens of the same state, with a person or persons on the opposite side to them. *Girardey v. Moore*, 397
12. Subject to a limitation as to the amount in controversy, the act of March, 3, 1875. "to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," invests the federal courts with jurisdiction arising from diverse citizenship of litigant parties, co-extensive with the judicial power conferred upon the general government by the constitution. *Ib.*
13. Persons who are only nominally interested in the controversy can not confer jurisdiction or take it away. *Ib.*
14. A bill in equity which seeks to take from the possession of a state, property possessed and claimed by it, and to subject it to the payment of bonds, which the bill alleges were indorsed by the state, but which indorsement the state denies, though nominally brought against the governor and other state officers, is in substance a suit against the state, and can not be maintained in a court of the United States, on

- the theory that the state has assumed the duties of a trustee for the holders of said bonds. *Cunningham v. The Macon & Brunswick Railroad Co.*, 418
15. A court of equity has no jurisdiction of a suit on a bond which, it is alleged, was, through the fraud of a person not a party to the suit, delivered up to be canceled, but which, it was claimed, was still in force when no discovery was sought, and when the bill furnished a substantial copy of the bond. *The Girard Insurance Company v. Guerard*, 427
 16. The courts of the United States, within a state, have equal and concurrent power with the courts of the state, to render judgments and carry them into execution. *Georgia v. The Atlantic & Gulf Railroad Co.*, 434
 17. Where a levy on railroad property is suspended by an affidavit of illegality and bond, under the Code of Georgia, the federal court does not exceed its jurisdiction in taking possession of the same property by its receiver. *Id.*
 18. It is incumbent on suitors who invoke the jurisdiction of the courts of the United States to bring themselves clearly within that jurisdiction. *Copeland v. The Memphis & Charleston Railroad Co.*, 651
 19. When property has been seized by a sheriff, by virtue of a writ of replevin issued out of a state court, and released to the defendant upon a forthcoming bond, it is still in the custody of the state court, to abide the result of the replevin suit, and not subject to seizure by the marshal, under a writ of replevin subsequently issued out of a United States court, at the suit of the United States. *United States v. Dantzer*, 719

LEGISLATIVE POWER.

1. The legislature of a state has authority, by legislative act, to compel a county, against its will, to levy and collect a tax for the improvement of a river or harbor within the county limits, and in which the county is vitally interested, although other counties and the state at large may also derive benefit from the improvement. *Kimball & Slaughter v. Mobile*, 555
2. A state can not, by its legislation, create a lien upon a vessel which shall have priority over one already existing by virtue of an act of congress. *Baldwin v. The Bradish Johnson*, 582
3. Several states may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into one; and one state may, without thereby creating a new corporation, authorize a corporation of another state to carry on business within its territory. *Copeland v. The Memphis & Charleston Railroad Co.*, 651

LIABILITY OF STOCKHOLDERS.

See STOCKHOLDER.

LIEN.

See ADMIRALTY, 8, 9, 10, 11, 12, 18, 47, 48, 49. CONSTITUTIONAL LAW, 18. EQUITY, 25, 26, 27, 28, 29, 30, 31, 32. PRACTICE IN EQUITY, 11. TRUSTS, 2.

1. In Louisiana the privilege of a landlord for rent, upon the goods of his tenant, is lost by their destruction by fire, and does not attach to the insurance money. *In re Reis*. 18
2. The wages of a watchman employed on a vessel while lying-up in port are not a maritime lien. *The John T. Moore*, 61
3. There is no maritime lien for the premium due on a policy of insurance taken on a vessel by her owners. *Ib.*
4. Pilotage and towage into port stand in the same rank of maritime liens with necessary supplies and repairs. *Porter v. The Sea Witch*, 75
5. But a claim for towage furnished in one voyage has a lien superior to a claim for supplies furnished on a previous voyage. *Ib.*
6. A lien given by the local law of Kentucky upon a steamboat for work and materials furnished in that state, for her construction, will be postponed by a United States court sitting in Louisiana, to a subsequent mortgage, duly recorded according to the act of congress, in New Orleans, where she was registered and enrolled, and which was her home port at the date of the mortgage and of its registration. *The Underwriters' Wrecking Co. v. The Katis*, 182
7. A judgment rendered by the United States circuit court for the western district of Texas, is a lien upon all the lands of the defendant within the district, without being recorded in the several counties where his lands lie. *The United States v. Scott*, 334
8. According to the jurisprudence of Texas, the lien of a judgment creditor without notice is superior to the unrecorded deed of the vendee of the defendant in execution. *Daggs v. Ewell*, 344
9. The position of a *bona fide* mortgagee is still stronger, for he stands in the plight of a purchaser, *Ib.*
10. A homestead exemption established by law can not affect antecedent liens, and can not be set up in derogation thereof. *The Townsend Savings Bank v. Epping*, 390
11. A sale made on the foreclosure of a lien for logs furnished a saw-mill, where there was a prior mortgage, conveyed only the equity of redemption, subject to the mortgage. *Ib.*
12. The lien of the state for taxes upon the property of a railroad company, rightfully in the custody of the law, is prior to all other liens whatsoever, except the lien of judicial costs. *Georgia v. The Atlantic & Gulf Railroad Co.*, 434
13. The laws of Georgia give no liens superior to a mortgage lien, except for taxes and to laborers and material men who take the proper steps to perfect their liens. *Held*, therefore, that in distributing the earnings of a mortgaged railroad, while the same were in the hands of a receiver, and the proceeds of its sale, the court would give priority only to those laborers and material men who had perfected their liens according to the state law. *Jessup v. The Atlantic & Gulf Railroad Co.*, 441
14. Claims on a railroad company for through fares and freight, for which it may have been accountable, in part, to connecting lines, are nothing more than open accounts, which stand on the same footing as other unsecured debts. *Ib.*
15. No court can, by rule, create maritime liens or change the order of existing liens. *Baldwin v. The Bradish Johnson*, 583

LIMITATIONS.

1. Article 3540 of the Civil Code of Louisiana, which declares that actions for the nullity of testaments are prescribed in five years, refers to actions brought against parties who are in possession under a will, and has no application to a suit in which a will is relied on as a muniment of title by a party out of possession. *Gaines v. Lizardi*, 77
2. Parties who claimed title to property of the estate of Daniel Clark, derived under his will executed in 1811, could not, in a suit brought by the universal legatee under his will executed in 1813, be considered as possessors in good faith, and entitled to plead the prescription of ten years. *Ib.*
3. Where, according to the jurisprudence of Louisiana, property mortgaged to secure several notes has been sold, at the suit of the holder of one of the notes, for a sum insufficient to discharge the entire mortgage debt, and he has been paid his *pro rata* share of the proceeds of sale, the purchaser takes the property subject to the lien of the mortgage which secures the *pro rata* share of the other holders of notes. In such case, the prescription of one of such notes does not inure to the benefit of the other holders of notes secured by the mortgage. The *pro rata* share of each note holder is unaffected thereby. *Weaver v. Alter*, 152
4. A statute of limitation which can not be pleaded against a note secured by a mortgage, can not be pleaded against the mortgage. *Daggs v. Ewell*, 344
5. Neither lapse of time nor any defense analagous to the statute of limitations can be set up by the trustee of an express trust, as a defense to his liability to execute the trust. *Hancock v. Walsh*, 351
6. A bill in equity was filed in the circuit court by certain legatees of a testator against the executor and other legatees, as defendants, to compel a settlement of the estate and a distribution of its proceeds among those entitled thereto. A final decree in accordance with the prayer of the bill was made establishing the amount due the complainants, and ordering its payment and allowing the legatees who were defendants to propound their claims by petition. In accordance with the decree, two of the defendant legatees filed petitions propounding their claims. *Held*, that the running of the statute of limitations against them was suspended by the filing of the original bill. *Lockhart v. Horn*, 542
7. The statute of limitations of six years (sec. 786, Revised Statutes) does not apply to suits brought on marshal's bonds by the United States. *The United States v. Godbold*, 550

LIS PENDENS.

See PRACTICE AT LAW, 2, 3.

LOTTERIES.

See CONSTITUTIONAL LAW, 5, 6, 7, 8.

LOUISIANA.

See ADMIRALTY, 8. BONDS, 1. EQUITY, 3. MORTGAGE, 1, 2. PRACTICE AT LAW, 1, 2, 3, 4, 5, 6. RES JUDICATA, 3. TRUSTS, 2. WILL, 1, 2, 3, 6.

MARRIAGE SETTLEMENT.

1. To make an ante-nuptial settlement void as a fraud on creditors, both parties to the settlement should concur in, or have notice of the intended fraud. *Wilson v. Prevett*, 681.
2. The husband and wife, parties to such a settlement, are deemed, in the highest sense, purchasers for a valuable consideration. *Ib.*
3. But if the settlement is not *bona fide*, the fact that it is made for a valuable consideration will not save it. *Ib.*
4. A marriage settlement can not be made a cover for fraud. If the purpose is to delay or defraud creditors, and both parties are cognizant of it, the consideration of marriage will not support the settlement. *Ib.*
5. If the amount of property settled is extravagant, or grossly out of proportion to the station or circumstances of the husband, and he is embarrassed by debt, and the other party knows it, this, of itself, is sufficient notice of fraud. *Ib.*
6. To ascertain the purpose of the grantor in a marriage settlement, evidence of fraudulent transfers by him to other persons at or about the time of the settlement, is admissible. *Ib.*
7. Actual knowledge, on the part of the prospective wife, of the fraudulent purpose of the grantor in the marriage settlement, is not necessary to avoid the deed. A knowledge of facts sufficient to excite the suspicions of a prudent person and put her on inquiry, amount to notice, and are equivalent to actual knowledge. *Ib.*
8. P. was indebted in the sum of about \$90,000, and owned property worth about \$50,000. In alleged consideration of marriage, he conveyed to his prospective wife property of the value of \$32,776, and in addition thereto, he conveyed to her other property of the value of \$13,300, to be held by her in trust for two favored creditors. This conveyance included all his property, except three thousand six hundred and eighty acres of land worth two dollars per acre, which was covered by a deed of earlier date, which had never been canceled. The deed of marriage settlement left \$70,000 of debts unprovided for. The prospective wife knew, before the marriage, and before the execution of the marriage settlement, that P. was embarrassed by his debts, and for that reason had demanded an ante-nuptial settlement before she would consent to marry him. *Held*, that the deed of settlement was in fraud of creditors and void. *Ib.*

MARRIED WOMEN.

See BANKRUPTCY, 6. MARRIAGE SETTLEMENT.

MASTER AND SERVANT.

- To justify a recovery against a master by one servant for an injury caused by the carelessness or negligence of a fellow-servant, it must be shown that the servant by whom the injury was caused was incompetent, and that the master was guilty of willful negligence in employing him. *Jordan v. Wells*, 527

MERGER.

B commenced, in a state chancery court, a suit against her late guardian, after his adjudication in bankruptcy, for a final settlement of his guardianship, and obtained a decree against him for the amount of the trust estate found in his hands, but the assignee was not a party to the suit: *Held*, (a) that the claim of the ward against the bankrupt estate was not merged in the decree of the chancery court, but was a provable claim against the bankrupt estate. (b) And that the assignee was not bound by the amount found by the chancery court, nor would the bankrupt be bound by the allowance of the claim by the bankrupt court. *Bourne v. Maybin*, 724

MISSISSIPPI.

See GUARDIAN AND WARD, 1, 2, 8, 7.

MISSISSIPPI RIVER.

See ADMIRALTY, 1, 2, 6.

MORTGAGE.

See ADMIRALTY, 8, 10, 11, 12, 13, 49. CHARTER, 8. LIEN, 18, 14. REGISTRY, 1, 2.

1. Under the jurisprudence of Louisiana, the proceeding to cause the erasure of a mortgage is properly instituted in the proper court of the parish wherein the mortgaged premises lie. *New Orleans National Bank v. Adams*, 21
2. By the same jurisprudence, a mortgage may be erased in a proceeding by rule. *Ib.*
3. Where a mortgage on lands is executed by the holder of the legal title duly recorded, to a mortgagee, without notice of any outstanding equitable title, no defenses against the mortgage are open to the equitable owner which can not be made by the holder of the legal title. *Daggs v. Howell*, 344
4. When a railroad company has authority to purchase, and does purchase a railroad lying within its chartered limits, the road so purchased becomes subject to a mortgage executed by the purchasing railroad company upon its line of road, completed and to be completed, but not to the prejudice of mortgages previously executed on the railroad so purchased. *Branch Sons & Co. v. The Atlantic & Gulf Railroad Co.*, 481
5. The vendors of a railroad so purchased, who received preferred stock in the purchasing company for the purchase price of the railroad sold, accepted interest thereon for years, and generally acquiesced in the sale, are not entitled to be first paid out of the separate proceeds of the railroad sold, after the satisfaction of the separate mortgages on the same. *Ib.*

MUNICIPAL CORPORATIONS.

See CONTRACTS, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.

1. The property of a municipal corporation necessary to the exercise of its functions, such as markets, prisons, etc., or property which has

been destined and set apart by an act of the legislature as a permanent revenue, or source of permanent revenue for the corporation, can not be seized or sold on execution against it. *The City of New Orleans v. Morris*, 108

2. A place of traffic called a market bazaar, owned by a municipal corporation for the sale of merchandise, from which the sale of fresh meats, fish and vegetables was excluded, and which had been rented out by the corporation for a term of years, is not such a market as is protected from execution, and no authority having been given by the legislature to establish such a bazaar, it is subject to levy and sale. *Ib.*
3. A municipal corporation can not, by its own act, independent of any legislative authority, make a thing which is not necessary to its municipal existence, or to the exercise of the powers which fairly belong to it, a permanent source of revenue, and thereby exempt the thing and the revenue derived from it from seizure on execution. *Ib.*
4. Markets are places where comestibles, perishable in their nature, are sold for the daily consumption of the people, which, from the very nature of the things therein sold, require sanitary regulations, and thus fall within the police power of cities. *Ib.*
5. As a general rule a public place is inalienable except by the sovereign. *The City of New Orleans v. Morris*, 115
6. But a public place, which is a portion of the batture in front of the city of New Orleans, has a distinctive quality impressed upon it, and may be withdrawn from the use of the public by the city. *Ib.*
7. The leasing, by the city, of a portion of the batture for a market bazaar, for a term of ten years, for a certain rent reserved, is a withdrawal from public use of so much of the batture as is included in the lease. *Ib.*
8. The charter of a city declared that "the city council may, when it deems it for the public interest, provide for the construction of a city hall, markets and other structures of public necessity and utility, the cost of which shall be paid by the city, provided that whenever the amount or cost * * * of erecting the structures aforesaid, from time to time, exceeds the amount of funds in the city treasury, then the council are hereby authorized to issue bonds of the city, * * * and said council shall have power to dispose of said bonds in such manner as they may deem for the best interests of the city, the proceeds of which shall be used solely for the purpose for which they shall be issued; and, also, that "no ordinance * * * providing for the purchase of real estate shall be passed except by a majority of the council."
Held, that these provisions of the charter did not authorize the city council to issue bonds to pay for a tract of land within or near the city limits, to be given to a foreign railroad corporation on which to establish and maintain its depot and machine shops. *Lewis v. The City of Shreveport*, 205
9. To authorize a municipal corporation to issue bonds for purposes not fairly coming within the ends for which municipal corporations are created, there must be a legislative grant of power either in express terms or by necessary implication. *Ib.*
10. A municipal corporation can not clothe itself with power to issue bonds for extraneous purposes by the assertions of the legislative,

executive and judicial departments of its government, and of its inhabitants, that it possesses the power. *Ib.*

11. In deciding whether a municipal corporation has power to issue bonds for a specific purpose, the construction put upon the charter by all parties in interest, and where rights have grown up under that construction, is entitled to weight only in a case where the power may be fairly inferred from the terms of the charter. In such a case, doubts and ambiguities will be resolved in favor of the power. *Ib.*
12. Where a municipal corporation issues bonds for a purpose not authorized by its charter, it can not be estopped from denying its authority to do so by the acts of its inhabitants and officers, nor by receiving and retaining the consideration for which the bonds were issued. *Ib.*
13. An issue of bonds by a municipal corporation, without authority of law, can not be ratified by its officers without the sanction of the legislature. *Ib.*
14. Where an act of the legislature authorized a city to issue its bonds in aid of a railroad company, and ratified a contract by which the city, having issued its said bonds, agreed to appropriate sufficient moneys from its treasury to pay the accruing interest thereon, the city was thereby authorized to levy a tax to pay said interest, and such authority carried with it the duty to make the levy. *Sibley v. The City of Mobile,* 535
15. But when, at the time of the issue of the bonds, the constitution of the state limited the taxing power of the city to a certain per centum upon its taxable property, the city could not exceed that limit; but, having first levied a tax sufficient to pay its current expenses, it was bound by its contract to exhaust, if necessary, the residue of its taxing power in order to pay the interest on said bonds. *Ib.*
16. Where such a constitutional limit to the taxing power existed, it was not competent for the legislature, by an act passed after the issue of said bonds, to direct that the entire taxing power of the city should be exhausted for the payment of the holders of bonds of another issue, who had no specific claim upon the fund raised by taxation, or any part thereof. *Ib.*
17. Where the taxing power of the city was limited by the constitution, all the holders of the bonds issued by the city were entitled to share *pro rata* in the general fund raised by taxation, which remained after the payment of the current expenses of the city. *Ib.*
18. A city with a limited power of taxation which, by neglect to levy and collect taxes, has permitted the interest on certain of its bonds to fall in arrears, can not defend against an application for the writ of *mandamus* to compel the levy of a tax to pay a judgment recovered for interest due on bonds of a later issue, by alleging that a levy to pay the interest in arrears on the older issue would exhaust its taxing power, when, at the same time, it expresses no purpose to levy a tax for that object. *Ib.*

MARITIME LIENS.

See ADMIRALTY, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17. LIENS, 2, 3, 4, 5.

MARKET.

See MUNICIPAL CORPORATIONS, 1, 2, 7.

Markets are places where comestibles, perishable in their nature, are sold for the daily consumption of the people, which, from the very nature of the things therein sold, require sanitary regulations, and thus fall within the police power of cities. *The City of New Orleans v. Morris*, 103

NATIONAL BANKS.

See STATUTES CONSTRUED, 1

A person who allows a transfer to be made to him, upon the books of a national bank, of shares of stock therein, even though such transfer is made solely as security for a debt due the transferee, becomes individually liable for all contracts and engagements of the bank to the extent prescribed by the currency act. *Moore & Janney v. Jones*, 53

NEGLIGENCE.

See SERVANT, 1, 2, 3, 4.

NEW ORLEANS.

See BONDS, 1, 2, 3.

NOTES AND BILLS.

See CONTRACTS, 14. COUPONS. SPOILIATION.

1. Where the payee and owner of a promissory note has voluntarily destroyed the same, he can not recover judgment against the maker, either upon the note itself or upon the debt which was the consideration for which the note was given. *Booth v. The Succession of Smith*, 19
2. Generally suit may be brought on any commercial paper payable at a particular place without a previous demand at that place. *Warner v. The Rising Fawn Iron Co.*, 514

NOTICE.

See MARRIAGE SETTLEMENT, 7.

1. Where the mortgagee of a mortgage on a vessel, which was recorded in the proper custom-house, had notice of a prior unrecorded mortgage, his mortgage was postponed to the unrecorded mortgage. *The John T. Moore*, 61
2. Service of notice or process upon the officer of a railroad company, authorized by its charter or the law to receive service, is good, although such officer may fraudulently conceal the fact of such service from other officers of the company. *Allen v. The Dallas & Wichita Railroad Co.*, 316
3. Possession of land is constructive notice of the title of the possessor, but, being constructive only, its effect can not be extended to lands outside the limits of the possession claimed by another party under the same title. *Daggs v. Ewell*, 844

4. An intent to sell coupons may be inferred when the holder has actual notice that purchase, and not payment, was intended by the other party, and, having such notice, he consents to take his money, or if, after such notice, he acquiesces in the transaction. *Duncan v. The Mobile & Ohio Railroad Co.*, 567
5. The circumstances stated, which, in this case, were held to amount to notice, were sufficient to put the party on inquiry. *Ib.*
6. Although such circumstances may not be sufficient notice to bind the party absolutely to a contract of sale, yet, if he fails to repudiate the contract and return the money, he will be bound. *Ib.*

NOVATION.

1. Where a creditor receives, in satisfaction of his debt, the note of or a draft upon a third person, it is a novation of the debt, which is thereby extinguished, with all its accessory rights and privileges. *The Underwriters' Wrecking Co. v. The Katie*, 182
2. The owner of a steamboat in process of construction drew drafts in favor of the builder upon a third person, who accepted them. The builder received the drafts in payment and receipted his account for work and materials; the drafts were renewed and the renewed drafts protested for non-payment, but no steps were taken to charge the indorser. *Held*, that the debt for work and materials was novated. *Ib.*

OFFICER.

See **CRIMES AND OFFENSES**, 1. **RETURN**, 4, 5.

1. The return of an officer touching any fact about which he was bound to make return, is conclusive on the parties to the suit and their privies. *Von Roy v. Blackman*, 98
2. The return of an officer of a fact which necessarily involves an opinion, is no exception to this rule. *Ib.*
3. It is the duty of a court to take notice of the sufficiency of the returns of its officers. *Ib.*

PARENT AND CHILD.

See **GUARDIAN AND WARD**, 5, 6.

PARTIES.

See **EQUITY**, 2, 3. **JURISDICTION**, 13. **PRACTICE IN EQUITY**, 8, 9, 10, 11, 12. **REMOVAL OF CAUSES**, 41, 43.

PARTNERSHIP.

Where the same partners carry on the same business at different places, under different partnership names, there are not two distinct firms, the assets of both nominal firms are equally applicable to the payment of all the creditors of both. *In re J. J. Williams & Co.*, 493

PART OWNER.

See **ADMIRALTY**, 20, 21, 46.

PERPETUITY.

See DEVISE, 7.

PILOTAGE AND TOWAGE.

See ADMIRALTY, 16, 17.

PLEADING.

See FRAUD, 1. PRACTICE AT LAW, 1, 2, 3, 4, 5, 6, 7, 9, 10, 11. RES JUDICATA, 3.

PLEDGE.

See BONDS, 4.

1. Pledges of bonds payable to bearer, hypothecated to secure a debt, are legal holders, and are entitled to demand payment of coupons which fall due before the maturity of the debt which the bonds were pledged to secure. *Warner v. The Rising Fawn Iron Co.*, 514
2. A railroad company pledged its earnings for advances obtained by its president to pay its semi-annual interest. *Held*, that this pledge of the earnings was made for the security of the president, and did not prevent him from paying other debts with such earnings, if he found it expedient and for the company's interest to do so. *Duncan v. The Mobile & Ohio Railroad Co.*, 587

POSSE.

- A United States soldier, when acting as a part of the posse of a United States marshal or revenue officer, is as much bound to obey the laws of the state as any other citizen, and he has the same rights of self-defense, and no other. *Georgia v. O'Grady*, 496

POSSESSION.

See NOTICE, 3.

PRACTICE AT LAW.

See FRAUD, 1. REMOVAL OF CAUSES, 11, 12, 14, 15. REPLEVIN. STATUTES CONSTRUED, 5. TRESPASS TO TRY TITLE, 1, 2.

1. Under the jurisprudence of Louisiana, an exception to the petition of a plaintiff who sues as administrator, to the effect that the plaintiff is not administrator, must be pleaded *in limine litis*; it can not be pleaded after judgment by default, or after the filing of a defense to the merits. *Barras v. Bidwell*, 5
2. Such an exception can not be embodied in the answer, and, by the rule of the court, it must be verified by affidavit. *Ib.*
3. The same rules apply to the exception of *lis pendens*. *Ib.*
4. It is a good ground of exception to a claim in reconvention, that it has been substantially adjudicated in another suit between the same parties in another state, where it was pleaded as a counter-claim. *Ib.*

5. The fact that the claim in reconvention is somewhat broader than the counter-claim, though founded on the same contract, will not relieve it from the exception. The whole might and should have been litigated and decided in the issue raised on the counter-claim. *Ib.*
6. A claim in reconvention should be pleaded with the same precision and detail as an original cause of action. *Ib.*
7. Demurrers were filed in the circuit court, on various grounds, to the petition of the plaintiff, and were sustained by the court. The cause was taken by writ of error to the Supreme Court, by which the judgment of the circuit court was reversed and the cause remanded. *Held*, that the defendants should not be allowed to file, in the circuit court, further demurrers to the plaintiffs' petition. *Hitchcock & Co. v. The City of Galveston*, 269
8. According to the jurisprudence of Texas, a defendant in an action of trespass to try title, who has pleaded not guilty, and has also, in pleading the statute of limitations, set up title in himself, is not precluded from showing the invalidity of the plaintiff's title. *Sheirburn v. Hunter*, 281
9. Under article 1442, Paschal's Digest of the Laws of Texas, where a contract alleged to have been made by a city was executed by its mayor, the plea of *non est factum* need not be sworn to by the mayor. In such a case, where the act of the mayor is questioned, the plea is properly sworn to by members of the common council, and an affidavit made by them, to the best of their knowledge and belief, is sufficient. *Hitchcock v. The City of Galveston*, 287
10. Under the jurisprudence of Texas, the party making a charge of fraud must point out, at least in general terms, the acts upon which he relies to sustain it. *Ib.*
11. Since the passage of the act of June 1, 1872 (17 Stat., 196), the federal courts will follow the decisions of the state Supreme Court on questions of pleading. *Taylor v. Brigham & Kelly*, 377

PRACTICE IN EQUITY.

See EQUITY, 7, 21, 22, 23, 24. RETURN, 1, 2, 3

1. A return of a subpoena in equity which declared that the subpoena had been handed to a person at the domicile of the defendant, and who resided at said domicile, the defendant being absent, is not a sufficient return of service. *Von Roy v. Blackman*, 98
2. The return, where the service is by leaving a copy of the subpoena at the dwelling-house, or usual place of abode of the defendant, must show that the copy was handed to a member of or resident in the family of the defendant. *Ib.*
3. A controversy between co-defendants to a bill in equity can not be the matter of a cross-bill, unless its settlement is necessary to a complete decree upon the case made by the original bill. *Weaver v. Alter*, 152
4. Section 720 Revised Statutes, which declares that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state," has application only to such proceedings as had been commenced before the jurisdiction of the federal court attached. *The State Lottery Co. v. Fitzpatrick*, 222

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5. Service of notice or process upon the officer of a railroad company, authorized by its charter or the law to receive service, is good, although such officer may fraudulently conceal the fact of such service from other officers of the company. *Allen v. The Dallas & Wichita Railroad Co.*, 316
 6. But where such officer fraudulently conceals the service upon him of a motion for the appointment of a receiver of the property and effects of the railroad company, and by means of such concealment the company fails to resist such appointment, and claims that the same is an invasion of its rights, and ought not to have been made, the court will re-open the case and allow the company to move to vacate the appointment. *Ib.*
 7. Where a suit in equity is submitted on bill and answer, the answer must be taken as true; and where it denies the case made by the bill, the bill must be dismissed. *The United States v. Scott*, 334
 8. When one of two joint mortgagors conveyed absolutely to the other his equity of redemption: *Held*, that he was not a necessary party to a bill to foreclose. But his right to redeem, in case the mortgaged property did not satisfy the mortgaged debt, would not be foreclosed by the decree. *Townsend Savings Bank v. Epping*, 390
 9. Without being a party he would be bound, by an account taken, to ascertain the sum due on the mortgage, unless he could show collusion. *Ib.*
 10. Courts of equity are always unwilling to turn a complainant out of court on an objection, for want of proper parties, made at the final hearing. If they deem it necessary that a new party be made, they will generally allow the cause to stand over for that purpose. *Ib.*
 11. A mortgage lien was paramount to a claim for homestead in the mortgaged premises: *Held*, that the wife of the mortgagor was not a necessary party to a bill to foreclose. The right to homestead was to be considered in the light of a subsequent incumbrance. *Ib.*
 12. The wife is only interested to see that the mortgage shall not absorb more than it ought, to the detriment of the homestead, and the husband, being primarily liable on the mortgage note, is the only necessary party to be present at the taking of the account. Such account will be binding on persons only collaterally liable, unless collusion is shown. *Ib.*
 13. The only effect of a decree *pro confesso* is to enable the case to be proceeded with *ex parte* against the defendant as to whom it is taken. Unless followed by a final decree it settles no rights. *Lockhart v. Horn*, 542
 14. The presumptions are in favor of the findings of the master. They will not be disturbed, unless shown to be erroneous. *Ib.*
 15. It is not according to equity practice to institute upon a petition filed after final decree a new train of pleadings. The only purpose to be subserved by such a petition is to bring the claim of the petitioner to the notice of the court or master. *Ib.*
 16. When a bill is dismissed, without prejudice, the complainant is not barred from bringing a new bill against other parties on the same claim, or against the same parties' bond, on new or additional facts. *Kimball & Slaughter v. Mobile*, 555

17. On the filing of a bill of review, the equity practice requires the complainant to give security or deposit a sum of money for satisfying the costs and the damages for delay, if the case is found against him. *Swan v. Wright's Executors*, 587
18. But if such a bill is filed without security or deposit, and the defendant allows the case to proceed and costs to accumulate without objection, he can not have the bill instantly dismissed on motion. *Ib.*
19. In such case the complainant will, on motion, be ordered to give the security or make the deposit within a day named, and, in default thereof, his bill will be dismissed *Ib.*
20. To entitle a party to bring a bill of review, it is necessary that he should have obeyed and performed the decree. *Ib.*
21. When the complainant, in a bill of review, had leave of the court to file his bill, and had performed all things required by the decree up to the time of filing his bill of review, but had failed to perform matters required by the decree to be performed after the date of filing the bill of review, he was ordered by the court, on motion of the defendant, to perform, by a certain day, those matters as to which he was in default, on penalty of having his bill of review dismissed. *Ib.*
22. It is no sufficient reply to a motion to dismiss a bill of review on the ground that the decree sought to be reversed has not been performed, to say that there is ample security for the performance of the decree. The defendant in the bill of review is entitled to the absolute performance of the decree. *Ib.*
23. The disposal, by decree of court, of railroad property mortgaged to secure many bondholders, so as to protect the interests of all, is beset with difficulties. In this case, where a large proportion of the bondholders had combined to purchase the railroad, or to reorganize the company without a sale, the court allowed the non-subscribing bondholders to participate in the purchase or reorganization on an equal footing with the others, provided they came in by a day named. *Duncan & Elliott v. The Mobile & Ohio Railroad Co.*, 597
24. Depositions of Dutch bondholders, complainants, in a suit in equity, were taken in Holland. Before the depositions were actually taken by the examiner, their counsel had read to them the interrogatories, and had prepared their answers in the English language. *Held* (1), that the fact that the witnesses had heard the interrogatories in advance was not a ground for suppressing the depositions; and, (2), that examination of witnesses should be made by the examiner, and not by counsel, in advance, and because this was not done in this case the depositions should be suppressed. *North Carolina Railroad Co. v. Drew*, 691
25. Equity rule sixty-seven authorizes the court to appoint examiners for the taking of depositions orally, outside as well as inside its territorial jurisdiction. *Ib.*
26. Equity rule seventy-eight does not change the English practice, and does not allow, generally, the oral examination of witnesses on the trial; it permits witnesses to be so examined merely to verify some document referred to in the pleadings, or to establish some fact of a formal character which has been inadvertently omitted in the testimony. *Ib.*

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PREAMBLE.

See CONSTRUCTION OF STATUTES, 1.

PRIORITY.

See BONDS, 2, 3. COUPONS, 3. LIEN, 8, 12, 13, 14. MORTGAGE, 5.
RULE OF COURT.

PRIVILEGE.

See LIEN.

PROBABLE CAUSE.

See CONSTITUTIONAL LAW, 22, 23.

PROMISSORY NOTES.

See NOTES AND BILLS.

PUBLIC PLACE.

1. As a general rule a public place is inalienable except by the sovereign.
The City of New Orleans v. Morris. 115
2. But a public place, which is a portion of the batture in front of the city of New Orleans, has a distinctive quality impressed upon it, and may be withdrawn from the use of the public by the city. *Ib.*

PURCHASER.

See SALE.

The husband and wife, parties to a marriage settlement, are deemed, in the highest sense, purchasers for a valuable consideration. *Wilson v. Prewett,* 631

RAILROADS.

See CHARTER, 1, 2. EXECUTION, 2. MORTGAGE, 4, 5. SALE.

RECEIVER.

See EQUITY, 32. JURISDICTION, 17. SALE.

1. Where a deed of trust executed by a railroad company mortgaged its income and profits, as well as its railroad and other property, to secure the payment of the principal and interest of its bonds, and authorized the trustees, in default of the payment of the interest, to take possession of the mortgaged property, and apply the income to the payment of the interest: *Held*, upon the application of the trustees, that such default was a sufficient ground for the appointment of a receiver. *Allen v. The Dallas & Wichita Railroad Co.,* 316
2. In such a case, the appointment of a receiver should not be denied because it is not shown that the property mortgaged is insufficient to pay the mortgage debt, or that it is in jeopardy, or that the company is insolvent, or because the amount due on some of the bonds is in dispute. *Ib.*
3. The charter of a railroad company conferred on it a large grant of land, but provided that unless twenty miles of its road were completed and in order for use before a date named, both the charter and

the land grant should become forfeited. The company had issued and sold 250 bonds of \$1,000 each, which were secured by a deed of trust on its road and other property. The company was insolvent. About two miles of the twenty miles of its track remained to be built, and little over one month of the time limited for the completion of the twenty miles remained. The company was unable to procure the means to build the remaining two miles, the contractor for building the road had failed and had abandoned his contract, and there was imminent danger of the forfeiture of the charter of the company and of its grant of lands. *Held*, that under these circumstances it was the duty of the court, upon the application of trustees of the bondholders, to appoint a receiver, with authority and orders to complete the twenty miles of road within the time limited by the charter. *Ib.*

4. The equity of section 3669, Code of Georgia, applies to the taking into possession of property by a receiver, under the order of the court, as well as to a levy under execution. *Georgia v. The Atlantic & Gulf Railroad Co.*, 434
5. The receiver holds the property as a sheriff would, subject to the prior lien which is being contested. *Ib.*
6. A mortgage, to secure an issue of bonds, provided that, after a default continuing for six months, in the payment of the interest coupons attached to the bonds, the trustees named in the mortgage might, upon the request of any holder of bonds, take possession of the mortgaged property and advertise and sell the same to pay the bonds and coupons. A bill having been filed to foreclose the mortgage: *Held*, that the fact that the condition existed which authorized the trustees to take possession of the mortgaged property, and the refusal of the trustees to take possession, were sufficient grounds for the appointment of a receiver. *Warner v. The Rising Fawn Iron Co.*, 514
7. A court by which a receiver has been appointed ought not to allow the receiver to be sued, unless the petition for leave states a *prima facie* cause of action against him. *Jordan v. Wells*, 527

RECONVENTION.

See PRACTICE AT LAW, 4, 5, 6.

REGISTRY.

See ADMIRALTY, 8, 9, 10, 11, 12, 13.

1. The registry of a mortgage not executed in such manner as to authorize its record in the proper office, is not of itself notice to parties subsequently dealing with the mortgaged property. *Branch, Sons & Co. v. The Atlantic & Gulf Railroad Co.*, 481
2. A deed of trust in the nature of a mortgage is technically a deed, and when executed with the formalities required by the law of Georgia, for the registration of a deed, may be properly registered, and its registry will be constructive notice to all the world. *Ib.*

REMOVAL OF CAUSES

See CONSTITUTIONAL LAW, 24.

1. A plaintiff who has a suit in a state court in which there is a controversy between him and a citizen of the same state touching the title to a tract of land, can not remove the case to the federal court merely

because he claims title under a sale made by the United States marshal upon a *fleri facias* issued from the federal court. *Gay v. Lyons*, 56

2. Such a case can not be removed unless the validity or effect of the judgment, or the proceedings and sale under which the plaintiff claims title is brought in question. *Ib.*
3. The petition of a party against whom a prosecution has been instituted in a state court, to remove said prosecution to the federal court, on the ground that the same is on account of an act done under the provisions of title xxvi, United States Revised Statutes, should state such facts as show to the court that the case falls within the category of removable causes. *Anderson ex parte*, 124
4. Where a petition is presented to a state court under section 641 United States Revised Statutes, for the removal of a prosecution pending in that court, to the federal court, the state court has the right to examine its sufficiency. *Wells ex parte*, 128
5. But the federal court, by virtue of its superior right to try the case, if subject to removal, is entitled to assert its jurisdiction by proper process directed to the state court. *Ib.*
6. Where this is done by the federal court, it will be the duty of the state court and its officers to yield obedience to the writs issued from the federal court to effect such removal. *Ib.*
7. A petition for the removal of a cause under section 641 United States Revised Statutes, which alleges that the law for the selection of jurors, which is constitutional and on its face fair, will be so administered as to secure a jury inimical to the petitioner, and which alleges the existence of a general prejudice against him in the minds of the court, jurors, officers and people, does not state facts sufficient to authorize the removal. *Ib.*
8. It is only when some state law, statute, ordinance, regulation or custom hostile to the rights of the petitioner, and their enforcement, is alleged to exist, that the petitioner can have his case removed under that clause of said section on which the petitioner in this case relies. *Ib.*
9. Where, in an action of trespass brought in a state court, the defendant justifies the alleged trespass under the authority of a court and of the laws of the United States, the case is removable to the federal court under section two of the act of March 3, 1875 (18 Stat., 470), as a case arising under the constitution or laws of the United States. *Houser v. Clayton*, 273
10. Where such case has been removed to the federal court, on the ground that it is one arising under the constitution or laws of the United States, that court will confine the defendant substantially to the ground of defense which he indicated in his petition for removal. *Ib.*
11. Where a petition for the removal of a cause from a state to a federal court, under section two of the act of March 3, 1875, *supra*, alleged as ground of removal that there was in the suit a controversy between the plaintiff who, when the suit was brought, was an alien, and the defendant, who was a citizen of the state where the suit was brought: *Held*, that the ground alleged was sufficient, and that the fact that

- the plaintiff, after the suit was brought, had become a citizen of the United States, did not prevent the removal of the cause. *Ib.*
12. The petition for the removal of a cause from the state to the federal court, may be amended. *Ib.*
 13. The act of March 3, 1875, *supra*, does not require the petition for removal to be verified; it is, nevertheless, eminently proper that it should be. *Ib.*
 14. Said act does not require that the order for the removal of the cause should be made before appearance by defendant. *Ib.*
 15. The fact that some of the defendants in a cause pending in a state court are citizens of the same state with the plaintiff, is not an obstacle to the removal of the cause to the federal court, if such defendants are merely formal and not necessary parties. *Edgerton & Doane v Gilpin*, 377
 16. Where a cause had been removed from a state court to a federal court, and had been pending and proceeding there, the removal acquiesced in for a number of years, and all objection to the jurisdiction of the federal court had been obviated by amendment: *Held*, that the cause would not be remanded to the state court on account of any irregularities in its removal. *Ib.*
 17. Under section 640, Revised Statutes, the right of one of the class of corporations therein mentioned, when sued in a state court, to remove the cause to the federal court, does not depend on the citizenship of the parties *Texas v. The Texas & Pacific Railroad Co.*, 308
 18. The truth of averments made by such defendant corporation in its petition for removal, to the effect that it has a defense arising under or by virtue of the constitution or laws of the United States, can not be inquired into, or controverted on a motion to remand the cause to the state court. *Ib.*
 19. Under said section the defendant corporation may remove a cause otherwise proper to be removed, from the state to the federal court, notwithstanding the fact that a state is plaintiff in the action. *Ib.*
 20. Where a contract between citizens of the same state—even though the contract is neither a promissory note, negotiable by the same merchant, nor a bill of exchange—has been assigned by one of the parties to the same to a citizen of another state, who has brought suit thereon in a court of the state of which the defendant is a citizen, the suit may be removed to the United States circuit court of the proper district, by virtue of the act of March 3, 1875 (18 Stat., 470). *Waterbury & Co. The City of Laredo*, 371
 21. Under the act of March 3, 1875, if some of the plaintiffs and some of the defendants to a suit are citizens of the same state, the removal of the cause must be sought by all the plaintiffs or all the defendants. *Girardey v. Moore*, 397
 22. But if all the plaintiffs on the one hand, and all the defendants on the other, are citizens of different states, then any one or more of either may remove the cause. *Ib.*
 23. Under the said act of March 3, 1875, the whole suit must be removed, or no removal can take place. *Ib.*

24. The said act of March 3, 1875, does not repeal that part of the act of July 27th, 1866 (14 Stat., 306), which authorizes one defendant, if a citizen of another state, to separate his case from that of the other defendants, who are citizens of the state where the suit is brought, and to remove it to the federal court. *Ib.*
25. Under section three of the act of March 3, 1875, for the removal of causes (18 Stat., 470), the failure of the party seeking the removal to file in the circuit court, on or before the first day of its session next after the filing of the petition for removal, a copy of the record from the state court, does not deprive the circuit court of jurisdiction of the case. *Jackson v. The Mutual Insurance Co.*, 418
26. In such a case the circuit court has discretion to remand the cause or not, as to it shall seem most conducive to the ends of justice. *Ib.*
27. Under said act the petition for removal need not aver that the parties were citizens of different states at the time the suit was brought. If they are citizens of different states when the petition for removal is filed, it is sufficient. *Ib.*
28. Three suits were brought in a state court by the same plaintiffs, citizens of one state, against the same defendant, a citizen of another state, on three promissory notes of the latter, all given for parts of the same consideration, and each for less than five hundred dollars, and the same defense existed to and was pleaded against all of the notes. *Held*,
 (1) That a verdict and judgment in one of the suits would constitute an estoppel, and be decisive of the others, and,
 (2) That, therefore, the matter in dispute, in each one of said suits, exceeded the sum or value of five hundred dollars, and that any one or all of said suits might be removed to the federal court under the act of March 3, 1875. *Ib.*
29. Under section 643 of the Revised Statutes, providing for the removal of criminal cases from a state to a federal court, the prosecution is not commenced until the finding of an indictment. *Georgia v. O'Grady*, 496
30. Upon the trial of an indictment for murder, removed to the federal court, under said section, the accused is called to answer to the offense as defined by the laws of the state. *Ib.*
31. The provisions of section 643, Revised Statutes, apply to every case of a federal revenue officer indicted in a state court for an act done under color of the United States revenue laws, but charged to be in violation of the criminal law of the state, and are not restricted to cases where an attempt is made by a state legislature to nullify a law of the United States. *Findley v. Satterfield*, 504
32. A bill was filed in a state chancery court, by certain complainants, in behalf of themselves and other creditors, to assert and enforce a lien on certain railroad property which had been sold and was in the possession of the purchasers. After final decree by which the lien was established, and while a reference to the master was pending to ascertain the amounts due the creditors who sought the benefit of the decree, the purchasers of the railroad property against which the lien had been declared, paid the complainants their claims in full, and bought up and settled other claims entitled to the benefit of the decree. Counsel for complainants received no compensation for their services, in respect to these last-mentioned claims. They, therefore, filed their petition in the state chancery court, entitled of the original

- cause, against the purchasers of the railroad property, in which they claimed a lien on said property for their fees in the original case, and prayed that the defendants to the petition might be served with notice thereof, and allowed to answer the same; that an account might be taken of what was due the petitioners for their said services; that the defendants might be decreed to pay them for said services such sums as were just and equitable; that they might be declared to have a lien on said railroad property therefor; and if said sums were not paid, that the property might be sold to pay the same, and for general relief. *Held*, that this petition was not a mere graft upon or appendage to the original suit, but was, to all intents, a suit in equity; and as the case fulfilled all other requirements of the statute, it could be removed from the state to the federal court, by virtue of the act of March 3, 1875, for the removal of causes. *Pettus & Dawson v. The Georgia Railroad & Banking Co.*, 820
83. A suit against a corporation was removed from a state to the federal court, on the ground that there was in it a controversy between citizens of different states, the plaintiff being a citizen of the state where the suit was brought. On a motion made by the plaintiff to remand the suit, because both parties were citizens of the same state: *Held*, that the burden of proof was on the corporation to show that it was not a citizen of the same state with the plaintiff. *Copeland v. The Memphis & Charleston Railroad Co.*, 651
84. The act of March 2, 1867, for the removal of causes from the state to the federal courts, is not repealed by the act of March 3, 1875, on the same subject. *Dennis v. The County of Alachua*, 683
85. It is not necessary that the petition for removal should be signed, or the affidavit required by the act of 1867 made by the petitioner in person. Both may be done by his attorney in fact. *Ib.*
86. The fact that the bond for removal was signed by the petitioner by attorney, or that the sureties on the same are insufficient, are not good grounds for remanding the cause to the state court. *Ib.*
87. When a cause is once removed from a state to a federal court, and there are no jurisdictional objections to its remaining there, it will not be remanded or dismissed for defects in the bond for removal, insufficiency of securities thereon, or other irregularities which can be remedied or have not worked any prejudice to the opposite party. *Ib.*
88. A defect or omission in the transcript of the record of the state court can be cured by *certiorari*. It is not a ground for remanding the cause. *Ib.*
89. The approval, by the state court, of the bond for removal of a cause, is not necessary to the jurisdiction of the federal court. *Ib.*
40. To warrant the removal of a cause from a state to a federal court, under the act of March 2, 1867, it is not necessary that the parties should have been citizens of different states at the time the suit was brought, provided they are citizens of different states when the petition for removal is filed. *Cook v. Whitney*, 715
41. Under said act, the filing in the federal court of an imperfect transcript of the record in the state court, is no ground for remanding the cause. *Ib.*
42. Garnishees are not parties to the suit. The fact that the plaintiff and the garnishees are citizens of the same state, is no obstacle to the removal of a case from the state to the federal court. *Ib.*

REPLEVIN.

When property has been seized by a sheriff, by virtue of a writ of replevin issued out of a state court, and released to the defendant upon a forthcoming bond, it is still in the custody of the state court, to abide the result of the replevin suit, and not subject to seizure by the marshal, under a writ of replevin subsequently issued out of a United States court, at the suit of the United States. *United States v. Dantzler*, 719

RES JUDICATA.

See FRAUD, 1.

1. It is a good ground of exception to a claim in reconvention, that it has been substantially adjudicated in another suit between the same parties in another state, where it was pleaded as a counter-claim. *Barras v. Bidwell*, 5
2. The fact that the claim in reconvention is somewhat broader than the counter-claim, though founded on the same contract, will not relieve it from the exception. The whole might and should have been litigated and decided in the issue raised on the counter-claim. *Ib.*
3. To maintain the plea of *res judicata*, the judgment must be final; if it is open to appeal, the plea will not hold. *New Orleans National Bank v. Adams*, 21
4. B commenced, in a state chancery court, a suit against her late guardian, after his adjudication in bankruptcy, for a final settlement of his guardianship, and obtained a decree against him for the amount of the trust estate found in his hands, but the assignee was not a party to the suit: *Held (a)*, that the claim of the ward against the bankrupt estate was not merged in the decree of the chancery court, but was a provable claim against the bankrupt estate. *(b)* And that the assignee was not bound by the amount found by the chancery court, nor would the bankrupt be bound by the allowance of the claim by the bankrupt court. *Bourne v. Maybin*, 724

RETURN.

1. The return of an officer touching any fact about which he was bound to make return, is conclusive on the parties to the suit and their privies. *Von Roy v. Blackman*, 98
2. The return of an officer of a fact which necessarily involves an opinion, is no exception to this rule. *Ib.*
3. It is the duty of a court to take notice of the sufficiency of the returns of its officers. *Ib.*
4. A return of a subpoena in equity which declared that the subpoena had been handed to a person at the domicile of the defendant, and who resided at said domicile, the defendant being absent, is not a sufficient return of service. *Ib.*
5. The return, where the service is by leaving a copy of the subpoena at the dwelling-house, or usual place of abode of the defendant, must show that the copy was handed to a member of or resident in the family of the defendant. *Ib.*

6. A United States marshal, who receives a warrant to be served from a circuit court commissioner, is bound to make return of his doings thereunder. *The United States v. Scroggins*, 529

RETURNING BOARD.

Members of the Election Returning Board established by the law of Louisiana are, even when engaged in canvassing the votes cast for presidential electors, state and not federal officers. *Anderson ex parte*, 124

RULE OF COURT.

See CONSTITUTIONAL LAW, 21, 22, 23.

No court can, by rule, create maritime liens or change the order of existing liens. *Baldwin v. The Bradish Johnson*, 582

SALE.

1. There can be no sale of coupons unless there was an intent on the part of the holder to sell. Such intent may be inferred when the holder has actual notice that purchase, and not payment, was intended by the other party, and, having such notice, he consents to take his money, or if, after such notice, he acquiesces in the transaction. *Duncan v. The Mobile & Ohio Railroad Co.*, 567
2. The railroad, and other property of a railroad company, which had for several years been in the hands of a receiver, was sold by a decree of the court, which directed a sale of the road, the franchises of the company, right of way, depots, rolling stock, tools and all other property of the company, real, personal and mixed.
Held (1), That the purchaser was not entitled to the money, the surplus earnings of the railroad, in the hands of the receiver; and,
 (2), That the purchaser was entitled to all cars, engines and other property placed on the railroad by the receiver, in the discharge of his duty, to carry on the business of the railroad and keep it in repair. *Strang v. The Montgomery & Eufala Railroad Co.*, 618

SAILING REGULATIONS.

When a boat is lying at anchor it is not necessary or proper for her to respond to the signals of passing steamers. *Culberg v. The Continental*, 82

SALVAGE.

See ADMIRALTY, 24, 25, 26, 27, 28, 29, 30, 31, 32, 44, 45, 47, 48.

SERVANT.

1. Where the servant of a railroad company sues for an injury caused by a defective car, there must be an averment that the car was defective when placed upon the road, or if it subsequently became defective, that notice of the defect was brought home to the company. *Kidwell v. The Houston & Great Northern Railway Co.*, 313

2. A notice of the defect to the car inspector and master mechanic would only tend to show negligence of duty on their part, and they being fellow-servants of the plaintiff, no cause of action could be based on such negligence. *Ib.*
3. Notice of the habitual negligence and general bad habits of a car inspector, brought home to the master mechanic of a railroad company, will not make the company liable for an injury to another servant of the company, resulting from the negligence of the car inspector, unless it is shown that power was conferred by the company upon the master mechanic to employ and discharge the car inspector. *Ib.*
4. To justify a recovery against a master by one servant for an injury caused by the carelessness or negligence of a fellow-servant, it must be shown that the servant by whom the injury was caused was incompetent, and that the master was guilty of willful negligence in employing him. *Jordan v. Wells,* 527

SOLDIER.

See POSSE.

SPECIFICATIONS.

See CONTRACTS, 4, 5.

SPOLIATION.

See WILL, 5.

Where the payee and owner of a promissory note has voluntarily destroyed the same, he can not recover judgment against the maker either upon the note itself, or upon the debt which was the consideration for which the note was given. *Booth v. The Succession of Smith,* 19.

STATUTES CONSTRUED.

- See BANKRUPTCY, 2. CONSTITUTIONAL LAW, 17. EXEMPTIONS, 4. INDICTMENT, 5. JURISDICTION, 1, 2, 6, 9, 12. LIMITATIONS, 1, 7. PRACTICE AT LAW, 9, 11. REMOVAL OF CAUSES, 1, 2, 8, 12, 13, 14, 15, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42. STOCKHOLDER, 1, 2. TAXATION, 1, 2.
1. The act of congress of February 18, 1875 (18 Stat., 320), which is incorporated in section 5198 Revised Statutes, does not confer exclusive jurisdiction upon the courts of the United States to try the actions therein referred to. *New Orleans National Bank v. Adams,* 21
 2. Section thirty of the act of March 2, 1867, entitled "An act to amend existing laws relating to internal revenue, and for other purposes," which is embodied in the Revised Statutes as section 5440, prohibits a conspiracy to defraud the United States, not only by committing some one or more of the offenses described in other sections of the act, but in any manner whatever. *The United States v. Dennee et al.,* 47
 3. Articles 942 and 943, Louisiana Code of Practice, prescribing what the *proces verbal* required to be made at the opening and proving of a will shall contain, do not, with the exception of that provision which relates to the order for executing and recording a will, apply to wills which are lost. *Gaines v. Lizardi,* 77

4. Where the proof showed that an olographic will was written, dated and signed by the testator, and bore date of some day in a designated month, but did not show of what particular day, this established sufficiently a compliance with the requirement of the Civil Code, that an olographic will shall be entirely written, dated and signed by the testator. *Ib.*
5. An act of the legislature of Louisiana abolished the writ of *feri facias* for the enforcement of judgments against the city of New Orleans, and declared that the effect of the judgment should be limited to fixing the amount of the plaintiffs' demand, and that said judgment should be registered and paid out of any money in the city treasury designated for its payment, and, if none were designated, that the city council might, if they deemed it proper, make an appropriation for its payment. *Held*, that said act is not made obligatory upon the courts of the United States by section 916 of the Revised Statutes. *The City of New Orleans v. Morris.* 115
6. Where a juror was summoned to the November term, 1876, and was impaneled and sworn on December 11, 1876, and afterwards was summoned as a juror to the November term, 1878, and was impaneled and sworn on December 14, 1878: *Held*, that he was not liable to challenge under section 812 of the Revised Statutes, although his service as a juror under the first summons extended to April 27, 1877. *The United States v. Reeves,* 199
7. The fact that a grand juror had, on a previous summons, attended the court as a juror within two years, does not constitute such a disqualification under section 812 of the Revised Statutes as will render bad any indictment found by the grand jury of which he is a member. *Ib.*
8. The purpose of section 5515 of the Revised Statutes was only to punish a violation of the state laws regulating elections, when such violation affected the election or the result of the election of a delegate or representative in congress. *The United States v. Nicholson,* 215
9. The election law of the state of Louisiana, approved April 11, 1877, does not authorize the use, by the commissioners of election, of two ballot boxes, one for the election of state and parish officers, and the other for the election of representatives in congress. *Ib.*
- 10 Section 720, Revised Statutes, which declares that "the writ of injunction shall not be granted by any court of the United States, to stay proceedings in any court of a state," has application only to such proceeding as had been commenced before the jurisdiction of the federal court attached. *The State Lottery Co. v. Fitzpatrick,* 222
11. An act of the legislature of Georgia, passed in 1842, established a lien of the highest dignity upon steam saw-mills, to secure the wages of the employes and debts due for saw logs and other necessities furnished said mill. On December 16, 1857, an act was passed which repealed the law, so far as it related to all saw-mills upon the several mouths of the Altamaha river, and declared that the term, "mouths of the Altamaha river," should include all the mills within ten miles of Darian, in straight line. *Held*, that a mill which was not strictly on one of the mouths of the Altamaha, but was embraced within the net-work of channels extending along the coast and connecting with the main channel of the Altamaha, and was within ten miles of Darian, by a right line, was fully within the terms of the repealing act. *The Townsend Savings Bank v. Epping,* 390

12. The purpose of the provisions of the act of the legislature of Georgia, passed December 3, 1866, which established a statutory mortgage on all the property of the Macon & Brunswick Railroad Company, to secure the payment of the bonds of the company, indorsed by the governor, was to protect the state from loss on account of such indorsement, and their effect was not to make the state a trustee for the bondholders. *Cunningham v. The Macon & Brunswick Railroad Co.*, 418
13. Section 3669 of the Code of Georgia, provides that when an execution has been levied on property, and an affidavit of illegality filed to stay proceedings thereon, the property so levied on shall be subject to levy and sale under other executions: *Held*, that under this section, such property was subject to execution from the federal as well as the state courts. *Georgia v. The Atlantic & Gulf Railroad Co.*, 434
14. A person may be guilty, under section 3177, Revised Statutes, of the offense of obstructing and hindering an officer of internal revenue in the exercise of his authority to enter any building or place where articles subject to tax are produced, for the purpose of examining such articles, although such person does not own the building or the articles subject to tax, and did not make, produce or keep them. *United States v. Fears*, 510
15. Under section 3177, Revised Statutes, a collector, deputy collector or inspector of internal revenue, may, without process, enter any building where distilled spirits, subject to tax, are produced or kept, so far as may be necessary for examining the same, and under section 3453, Revised Statutes, may, without process, seize illicit distilled spirits. *Id.*
16. The act of the legislature of Alabama, approved January 7, 1850, entitled "An act to incorporate the Memphis & Charleston railroad company," makes said company, within the state of Alabama, an Alabama corporation. *Copeland v. The Memphis & Charleston Railroad Co.*, 651
17. The act of March 2, 1867, for the removal of causes from the state to the federal courts, is not repealed by the act of March 3, 1875, on the same subject. *Dennis v. The County of Alachua*, 683
18. The act of the legislature of Florida, of January 8, 1853, relating to mortgages, was not intended to prevent a court of equity from taking possession of mortgaged property, where, by the negligence or misfeasance of the mortgagor it was being wasted so as to jeopard the security of the mortgagee. *North Carolina Railroad Co. v. Drew*, 691

STATUTORY MORTGAGE.

See EQUITY, 29, 31.

STOCKHOLDER.

1. The general law under which a corporation was organized declared: "No stockholder shall ever be held liable or responsible for the contracts or faults of such corporation in any further sum than the unpaid balance due to the company on the shares owned by him." The charter of the company prescribed in what installments forty per cent of the stock should be paid, and then declared: "The balance on each share, or any portion of such balance, shall not be

called for unless with the assent of three-fourths of the stockholders, and then only to increase the business of the company." *Held*, that after payment by a stockholder of forty per cent of his stock, he was not liable to the company, or its creditors, for the residue or any part thereof, unless the same had been called for by a vote of three-fourths of the stockholders. *The Paper Company v. Waples*, 34

2. A person who allows a transfer to be made to him, upon the books of a national bank, of shares of stock therein, even though such transfer is made solely as security for a debt due the transferee, becomes individually liable for all contracts and engagements of the bank, to the extent prescribed by the currency act. *Moore & Janney v. Jones*, 53

SUBORNATION OF PERJURY.

1. Subornation of perjury is in its essence but a particular form of perjury itself. *The United States v. Dennee*, 39
2. An indictment for subornation of perjury must aver that the defendant knew that the testimony which he instigated the suborned witness to give was false, and that in giving such testimony the witness would willfully and corruptly commit the crime of perjury. *Id.*

SUPPLIES.

See ADMIRALTY, 16, 17.

TAXATION.

See CONSTITUTIONAL LAW, 19.

1. The act of the general assembly of Georgia, of February 28, 1874, Laws of 1874, page 107, which requires railroad companies to return the value of their property to the comptroller-general, to be taxed as the property of other citizens, gives no authority to local or municipal bodies to tax the property of such companies. *The City of Savannah v. The Atlantic & Gulf Railroad Co.*, 432
2. The constitution of Georgia of 1877, which abolishes all laws exempting property from taxation, does not thereby impose any tax. Until the legislature authorizes a tax, none can be collected, and then only the particular tax authorized. *Id.*
3. Where an act of the legislature authorized a city to issue its bonds in aid of a railroad company, and ratified a contract by which the city, having issued its said bonds, agreed to appropriate sufficient moneys from its treasury to pay the accruing interest thereon, the city was thereby authorized to levy a tax to pay said interest, and such authority carried with it the duty to make the levy. *Sibley v. The City of Mobile*, 535
4. But when, at the time of the issue of the bonds, the constitution of the state limited the taxing power of the city to a certain per centum upon its taxable property, the city could not exceed that limit; but having first levied a tax sufficient to pay its current expenses, it was bound by its contract to exhaust, if necessary, the residue of its taxing power in order to pay the interest on said bonds. *Id.*
5. Where such a constitutional limit to the taxing power existed, it was not competent for the legislature, by an act passed after the issue of said bonds, to direct that the entire taxing power of the city should

be exhausted for the payment of the holders of bonds of another issue who had no specific claim upon the fund raised by taxation, or any part thereof. *Ib.*

6. A city with a limited power of taxation which, by neglect to levy and collect taxes, has permitted the interest on certain of its bonds to fall in arrears, can not defend against an application for the writ of *mandamus* to compel the levy of a tax to pay a judgment recovered for interest due on bonds of a later issue, by alleging that a levy to pay the interest in arrears on the older issue would exhaust its taxing power, when, at the same time, it expresses no purpose to levy a tax for that object. *Ib.*
7. Where a state bank, or state banking association, uses for circulation and pays out its own notes, such notes are liable to the tax of ten per cent imposed by section 3412 of the Revised Statutes. *The Savings Association v. Marks*, 553

TAXES.

See EXECUTION. LIEN, 12. TAXATION.

TENANT FOR LIFE.

See EQUITY, 84.

TENANT BY THE CURTESY.

See EQUITY, 85.

TEXAS.

See CONSTITUTIONAL LAW, 17. CONTRACTS, 11, 12, 13. DEED, 1, 2, 3. JURISDICTION, 8. LIEN, 7. PRACTICE AT LAW, 8. TRESPASS TO TRY TITLE, 1, 2. TRUSTS, 4, 5.

TITLE.

See DEED, 1, 2.

TITLE OF STATUTE.

See CONSTRUCTION OF STATUTES, 2.

TORTS.

See ADMIRALTY, 46.

TOW.

See ADMIRALTY, 51.

TOWAGE.

See ADMIRALTY, 16, 17.

TRESPASS TO TRY TITLE.

1. According to the jurisprudence of Texas, a defendant in an action of trespass to try title, who has pleaded not guilty, and has also, in pleading the statute of limitations, set up title in himself, is not precluded from showing the invalidity of the plaintiff's title. *Sheirburn v. Hunter*, 281
2. Under the statute law of Texas, it is not necessary, in an action of trespass to try title, to prove an actual trespass by defendant, except in cases where there is no controversy about the title, but only as to boundaries, and where the plaintiff having the superior title charges the defendant with trespassing on his land. *Viesca v. Wyche*, 836

TRUSTEE.

See EQUITY, 23, 27, 28. STATUTES CONSTRUED, 12. TRUSTS.

1. A state may become a trustee. *Hancock v. Walsh*, 351
2. A corporation may be a trustee, if not prohibited; with the qualification, perhaps, that the object of the trust shall be germane to, or in harmony with, the objects of the corporation. *Jones v. Habersham*, 443
3. A trustee is bound to keep clear, accurate and distinct accounts—otherwise all presumptions are against him, and all obscurities and doubts are to be taken adversely to him. *Bourne v. Maybin*, 724
4. A trustee who, previous to the late war of the rebellion, appropriated the trust estate to his own use, is liable for interest thereon during the period of the war. *Ib.*

TRUSTS.

See CONTRACTS, 15. EQUITY, 27, 28, 29. TRUSTEE.

1. A judgment creditor is not a *bona fide* purchaser, who, as such, is protected against a resulting trust. *Flanders v. Thompson*, 9
2. Where B, holding trust funds, invested them in real estate and took the title in his own name, and was afterwards compelled, by order of court, to convey the property so acquired to the party entitled to the money: *Held*, that a creditor of B, who had recovered and recorded judgments against him long before the latter took title to the property, could not, under the jurisprudence of Louisiana, acquire a lien thereon superior to the equities of the party with whose money the property had been paid for, and to whom it had been conveyed by order of this court. *Ib.*
3. A deed of lands to a purchaser without notice, duly recorded, cuts off any claim thereto founded on a resulting trust. *Daggs v. Howell*, 344
4. A trust assumed by the republic of Texas was not extinguished by the formation of the state of Texas and her annexation to the Union, but was fastened upon the state as the sovereign successor of the republic. *Hancock v. Walsh*, 351
5. Neither lapse of time nor any defense analogous to the statute of limitations can be set up by the trustee of an express trust, as a defense to his liability to execute the trust. *Ib.*

TUG.

See ADMIRALTY, 51.

ULTRA VIRES.

See CORPORATIONS, 1.

UNITED STATES COURTS.

See EVIDENCE, 5, 6. HABEAS CORPUS, 1, 2, 8. JURISDICTION, 16.

U. S. ATTORNEY.

The United States attorney has no authority to take from the hands of the marshal warrants regularly issued to him by a circuit court commissioner, for the purpose of deciding whether or not such warrants shall be executed. *The United States v. Scroggins*, 529

U. S. MARSHAL.

A United States marshal, who receives a warrant to be served from a circuit court commissioner, is bound to make return of his doings thereunder. *The United States v. Scroggins*, 529

USURY.

1. The repeal of a usury law which forfeited all interest upon the usurious contract leaves the contract in full force, according to its terms, and no forfeiture of interest imposed by such law can be enforced. *Daggs v. Howell*, 844
2. The adoption by the state, after such repeal, of a constitution imposing penalties for usurious contracts, can have no effect upon such contract. *Ib.*

VENDOR'S LIEN.

See EQUITY, 25, 26.

VIS MAJOR.

See ADMIRALTY, 52.

WARD.

See GUARDIAN AND WARD.

WARRANT.

1. A United States marshal, who receives a warrant to be served from a circuit court commissioner, is bound to make return of his doings thereunder. *The United States v. Scroggins*, 529
2. The United States attorney has no authority to take from the hands of the marshal warrants regularly issued to him by a circuit court commissioner, for the purpose of deciding whether or not such warrants shall be executed. *Ib.*

WILL.

See DEVISE, 1, 2, 3, 4, 5, 6, 7.

1. Article 8540 of the Civil Code of Louisiana, which declares that actions for the nullity of testaments are prescribed in five years, refers to actions brought against parties who are in possession under a will, and has no application to a suit in which a will is relied on as a muniment of title by a party out of possession. *Gaines v. Lizardi*, 77
2. Articles 942 and 943, Louisiana Code of Practice, prescribing what the *proces verbal* required to be made at the opening and proving of a will shall contain, do not, with the exception of that provision which relates to the order for executing and recording a will, apply to wills which are lost. *Ib.*
3. Where the proof showed that an olographic will was written, dated and signed by the testator, and bore date of some day in a designated month, but did not show of what particular day, this established sufficiently a compliance with the requirement of the Civil Code, that an olographic will shall be entirely written, dated and signed by the testator. *Ib.*
4. A discussion of the evidence to establish the fact that Daniel Clark duly executed a will in the year 1813, whereby he instituted his daughter, Myra Clark, as his universal legatee. *Ib.*
5. Discussion of the evidence to rebut the presumption that Daniel Clark destroyed said will, arising from the fact that it could not be found after his death. *Ib.*
6. Parties who claimed title to property of the estate of Daniel Clark, derived under his will executed in 1811, could not, in a suit brought by the universal legatee under his will executed in 1813, be considered as possessors in good faith and entitled to plead the prescription of ten years. *Ib.*
7. Certain devises and bequests in a will were made substantially in the following form: I hereby give, devise and bequeath to N. W. Jones all that lot (describing it), to him and his heirs forever. I hereby give, devise and bequeath to the Trustees of the Independent Presbyterian Church, in Savannah, all that full lot of land (describing it and declaring the purposes for which the devise was made). The devises were followed by an item which declared: "It is my wish and I hereby direct that none of the legacies, bequests or devises in any of the clauses of this, my will, shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as the Hodgson Memorial Hall, which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate." *Held*, that the gifts themselves were not suspended, but only the payment thereof. *Jones v. Habersham*, 443
8. There were devised by the will of the testator to the trustees of the Independent Presbyterian Church, in Savannah, a certain lot of land in that city, with the buildings thereon, upon terms and conditions stated as follows: *First*. That the trustees of the said Independent Church shall appropriate annually out of the rents and profits of said lot and improvements the sum of one thousand dollars to one or more Presbyterian or Congregational churches in the state of Georgia, in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause

of religion among the poor and feeble churches of the state. *Second.* This gift and devise is made on the further condition that neither the trustees nor any other officers of said Independent Presbyterian Church will have or authorize any material alteration or change made in the pulpit or galleries of the present church edifice on the corner of Bull and South Broad streets, but will permit the same to remain substantially as they are, subject only to proper repairs and improvements; nor shall they sell or alien the lot on which the Sabbath school-room of said church now stands, but shall hold the same to be improved in such manner as the trustees or pewholders may direct. *Third.* Upon the further condition that the trustees of said Independent Presbyterian Church will keep in good order and have thoroughly cleaned up every spring and autumn my lot in the cemetery of Bonaventure, and that no interment or burial of any person shall ever take place either in the vault or within the inclosure of said lot; and for the purpose of having the same protected and cared for, I hereby give, devise and bequeath my said lot in the Bonaventure cemetery to the trustees of the Independent Presbyterian Church and their successors." *Held*, (a) that the devise was not void for uncertainty; (b) that the condition not to allow any alteration in the pulpit and galleries of the church, but to hold the same to be improved, and not to alien the Sabbath school lot, did not render the devise void; the condition for the improvement of the pulpit, etc., was a proper charity, and the others were conditions subsequent, which could not affect a charitable gift; (c) that the church named as trustee was capable of taking and executing the trust. *Ib.*

9. A will contained the following devise: "I give and devise to the Union Society of Savannah, all that lot or parcel of land in the city of Savannah, on the north side of Bay street, and at or near its intersection with Jefferson street, extended or prolonged, known in the plan of said city as lot letter "B," with the buildings and improvements thereon, but on the express condition that said society shall not sell or alienate said lot, but shall use and appropriate the rents and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society." *Held*, (a) that the condition expressed is a condition subsequent, which, if void, does not vitiate the gift; (b) that a condition against alienation annexed to property devoted to charity does not render it void; (c) that the fact that the Union Society had already a surplus of funds does not vitiate the gift. *Ib.*
10. A will contained the following devise: "*Twelfth.* I give, devise and bequeath to the Widows' Society of Savannah, all that lot or parcel of land in Savannah, on the corner of President and West Broad streets, on which the improvements now consist of four brick tenement buildings, the rents and profits of the same to be appropriated to the benevolent purposes of said society." *Held*, that the Widows' Society being incorporated for the relief of indigent widows and orphans, the gift was not too general, and was for charitable purposes, and not for indefinite benevolence. *Ib.*
11. Where a will devised, on certain conditions, a gift over devises and bequests already made: *Held*, that said provision did not vitiate said devises and bequests. *Ib.*

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